

**REPORT ON UNITED STATES  
BARRIERS TO TRADE AND INVESTMENT**

***2002***

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## 1 INTRODUCTION

The 2002 Report on United States Barriers to Trade and Investment is the eighteenth such annual report. It has been compiled by the Market Access Unit of the Directorate General for Trade in co-operation with the Delegation of the European Commission in Washington, D.C., on the basis of material available to the services of the European Commission. Its aim is to provide an overview of the obstacles that EU exporters and investors encounter in the US.

This Report needs to be placed in the context of a transatlantic economic relationship that has grown strongly particularly over recent years, to the significant benefit of both economies.

The tragic events of 11 September have confirmed that the EU and the US are bound together by much more than just trade. However, the EU and the US are each other's main trading partners (taking goods and services together) and account for the largest bilateral trade relationship in the world. The total amount of 2-way investment amounts to over €1.1 trillion, with each partner employing about 3 million people in the other. In the year 2001, exports of EU goods to the US amounted to €237 billion (24.4% of total EU exports), while imports from the US amounted to €194 billion (19% of total EU imports). Concerning trade in services, exports of the EU amounted in 2000<sup>1</sup> to € 117 billion (40.3% of total EU exports) while imports from the US amounted to € 116 billion (40.7% of total EU imports).

This Report must be seen against the background of the joint commitment of the EU and the US, in the *New Transatlantic Agenda* (NTA) and in the *Transatlantic Economic Partnership* (TEP), to strengthen and consolidate the multilateral trading system, and to progressively reduce or eliminate barriers that hinder the flow of goods, services and capital between the EU and the US. The co-operative side of the EU-US partnership has also been reaffirmed at the EU-US summit of 2 May 2002 through the launch of a "*Positive Economic Agenda*". The objective of this exercise is to identify and focus on those specific areas where EU-US co-operation can deliver concrete, mutually beneficial results in the short to medium term.

The EU-US bilateral trade relationship must also be placed in the broader multilateral context of the Doha Development Agenda round of negotiations launched in November 2001, which aims at deepening trade liberalisation while ensuring integration of developing countries in the multilateral trading system. EU-US partnership was one of the key elements for the launch of a new round of negotiations, and this partnership will be equally essential for the successful conclusion of negotiations by 2004. The resulting reduction of tariff and non-tariff barriers to trade and investment will also unquestionably benefit the EU-US bilateral trade relationship.

Despite the significant co-operative efforts undertaken, a considerable number of impediments, ranging from more traditional tariff and non-tariff barriers, to differences in the legal and regulatory systems still need to be tackled.

Some of the most recent developments in US trade policy (*inter alia* the US failure to comply with a number of WTO dispute settlement findings, the imposition of safeguard measures on steel or the adoption of the *Farm Security and Rural Investment Act* of 2002, hereafter 2002 Farm Act), have raised concerns, in the EU and elsewhere, on the impact of domestic protectionist pressures on the US Administration's ability to meet its international obligations.

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<sup>1</sup> Data for 2001 were not available at the time of drafting this report.

The Commission remains firmly committed to addressing the existing and future obstacles to trade and investment in the US market through the appropriate channels (bilateral, plurilateral and multilateral) particularly as the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence-building process which is an integral part of the TEP.

Finally, this report should also be seen in the context of the broader policy initiative to improve access to foreign markets for European exports. As part of this, the Commission has set up an extensive electronic Market Access Database available to the public on the Internet (<http://mkacddb.eu.int>). The Database provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues. This facilitates access throughout the year to online updates of the material contained in the published report as well as to the additional background information that is included in the database.

Additional information and update on EU-US trade relations, as well as the Trade Barriers Report itself, is available at "Bilateral Trade Relations" Section of the web site of the European Commission's Directorate General for Trade (<http://europa.eu.int/comm/trade>).

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the Commission services' Report will continue to play a useful role in focusing dialogue and negotiations (both multilateral and bilateral) on the elimination of obstacles to the free flow of trade and investment. The Report has taken into account developments until **28 October 2002**. Any comments should be addressed to the Market Access Unit of the Directorate General for Trade, European Commission, 200 rue de la Loi, 1049 Brussels (fax: +32.2.296.73.93).

## **2 US TRADE POLICY: SUMMARY OF PROBLEM AREAS**

The US Administration has stressed that its trade policy is based on the values of openness, transparency and respect for the rule of law. These are principles to which the EU also firmly subscribes. Both regard the WTO as a fundamental element in achieving a world of open markets. Bilaterally, this shared commitment has contributed to the adoption of the NTA and has fostered the development of a healthy economic relationship. But despite this reinforced co-operation, there remain aspects of US trade policy which are a source of concern to the EU.

One of the most disquieting aspects of US policy is that domestic pressure to adopt protectionist measures appears to be stronger than willingness to seek internationally agreed solutions. The poor US record of "prompt compliance" of WTO Dispute settlement recommendations, and the actions recently taken on steel and agriculture, illustrate this.

Other elements of the US trade policy which raise EU concerns are described below.

### ***Extraterritoriality***

The EU strongly opposes the extraterritorial provisions of certain US legislation that hampers international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern are the *Helms-Burton Act* and the *Iran Libya Sanctions Act*. Progress towards a lasting solution to this dispute was made at the 18 May 1998 EU-US Summit. Implementation of the Understanding reached at that occasion, however, continues to depend on legislative action by the US Congress.

### ***Unilateralism***

Unilateralism in US trade legislation also remains a matter of concern. Whilst the US has in practice made extensive use of WTO fora, including its dispute settlement system, it continues to take unilateral trade measures. As a result, the EC has won two WTO dispute settlement cases, one against the suspension of customs liquidation in the banana dispute, and one against *Sections 301 to 310 of the US 1974 Trade Act*. The EC also initiated dispute settlement proceedings against the "*carousel*" legislation (section 407 of the Trade and Development Act of 2000), which, however, has so far not been applied.

### ***Tariff barriers***

Tariffs have been substantially reduced in successive GATT rounds. As a result, the EU's concern is now focused on a relatively limited number of US "peaks" and other significant tariffs where less progress has been made. Tariff-cutting negotiations on non-agricultural products were agreed at the Doha Ministerial Meeting. Therefore, a substantial reduction of US tariffs is to be expected as an outcome of those negotiations.

### ***Other customs barriers***

EU exports face a number of additional customs impediments, such as the customs user fees (Merchandise Processing Fee or Harbour Maintenance Tax) and the excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. Another major problem faced by EU exporters is the lack of recognition of the EC as a customs union. This

US position has been also translated in the negative stance of the US Government towards EC Membership to the World Customs Organisation (WCO). Finally, The Container Security initiative, launched by the US, will probably, through its implementation in different steps, induce discriminatory effects on EU ports, and possibly lead to disruption of traffic and transport patterns, threatening the functioning of the single market.

### ***Technical barriers to trade***

EU exporters continue to face a number of post-importation impediments. The proliferation of regulations at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international standards meaning that manufacturers cannot directly export to the US products made to EU standards (normally based on international standards). Other related difficulties concern labelling requirements and excessive reliance on third-party certification. The *EU-US Agreement on Mutual Recognition*, in force since 1 December 1998, has not been fully implemented due to a lack of commitment of the US Administration in some sectors.

EU exports of electrical and electronic equipment, which amount to 6% of total EU exports to the US, are particularly affected by the obstacles described. The failure of the responsible US agency, the Occupational Safety and Health Administration (OSHA), to implement the *MRA Annex for Electrical Safety* has led to the Commission's decision to propose to the European Council the suspension of this Annex.

Finally, it must be noted that the drug approval procedures of the Food and Drug Administration (FDA) continue to give non-US based firms difficulties.

### ***Sanitary and Phytosanitary Measures***

In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU. The most recent example of such difficulties is the suspension by the US authorities in December 2001 of the entry of Spanish clementines on phytosanitary grounds, a measure that has been contested by the EU. Concerning trade in animal products, it was expected that most of the problems might be solved by the *Veterinary Equivalence Agreement*, signed on 20 July 1999. However no real progress has materialised so far, partly as a result of the US failure to implement the agreement as foreseen.

### ***Government procurement***

Despite the fact that both the WTO Government Procurement Agreement and the EU-US bilateral procurement agreement increased substantially the bidding opportunities for the two sides, the EU remains concerned about the wide variety of *Buy America* provisions that persist, and to which are being added others for federally funded infrastructure programmes. Small business set-aside schemes also limit bidding opportunities for EU contractors in a substantial manner. The EU also opposes sub-federal selective purchasing legislation, restricting the ability of EU and other companies doing business with specific countries if at the same time they wish to bid for contracts in various US States and cities. Finally, it must be noted that the EU is awaiting a decision from the US Government to proceed to the mutual lifting of the existing sanctions on procurement of telecom equipment.

### ***National security restrictions***

The principle of national security has a long tradition in trade policy but the lack of a clear definition of "national security" has led to an overly wide interpretation of the term by the EU and the US has repeatedly expressed concern about its excessive use by the US as a disguised form of protectionism. This can be seen in relation to import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions. In particular, the

1988 *Exon-Florio Amendment* and following legislation to restrain foreign investment in, or ownership of, businesses relating to national security have proved to be problematic.

The events of 11 of September have led to the proposal, and in some cases the adoption of, a series of measures to increase security against future terrorist attacks. The EU, while fully supporting the need to ensure the highest levels of security, has some serious concerns about some of the proposals, in particular those relating to security in air and maritime transport. The EU continues to promote an international and multilateral response to world security challenges in the framework of the competent international organisations and urges the US Congress and the US Administration to maintain and support this approach.

### ***Trade defence instruments***

The use of US trade defence measures has experienced a substantial increase, notably in relation to steel products. The most striking example is the safeguards measures for steel announced by President Bush on 5 March 2002, which involve tariff increases of up to 30 percent. The unjustifiable nature of these measures has led the EC, as well as seven other WTO members, to request WTO consultations. A WTO Panel was established on 3 June 2002 and the EU is confident that it will confirm the WTO inconsistency of the US safeguard measures.

This is not the first time that the methodology used by US authorities and the protectionist use of US trade defence instruments have been challenged. There have been an increasing number of cases brought to the WTO Dispute Settlement system in relation to US trade defence legislation and proceedings. Several aspects of US trade defence legislation and practices, including those relating to safeguards, have been already condemned for their inconsistency with WTO Agreements (e.g. the *1916 US Antidumping Act*, the methodology used by the US DoC in privatisation cases, or the *de minimis* rates in sunset reviews).

### ***Subsidies and Government Support***

The EU continues to be concerned about the significant direct and indirect Government support to US industry, by means of direct subsidies, protective legislation or tax policies.

The *Foreign Sales Corporations* (FSC) scheme remains a matter of major concern, as the US has failed so far to implement the Appellate Body's report of 20 August 2001, which confirmed that the FSC replacement, the *FSC Repeal and Extraterritorial Income Exclusion Act* (ETI), is still an export subsidy inconsistent with the WTO Subsidies Agreement and the Agreement on Agriculture. On 30 August, the WTO arbitrators agreed with the EC and awarded the full amount (US\$4,043 billion) of potential countermeasures that could be applied if the US does not repeal the ETI scheme.

The adoption by the US Congress of the 2002 Farm Act increases significantly the trade distorting effect of US farm subsidies. This Act is clearly inconsistent with the express commitments of WTO Members, reinforced at Doha in November 2001, that farm policies should be reformed in the direction of less trade distorting forms of support.

The EU also remains concerned about the significant level of government support to US aircraft manufacturers and the US shipbuilding industry.

Finally, concerning state aid for airlines, while recognising the severe financial consequences of the events of 11 September on US airlines and the need to ensure that vital transport services in the US are maintained, the EU considers that the large scale financial assistance provided by the US Government to US air carriers represents a significant protection from the commercial pressures also facing foreign carriers, and is a potential impediment to fair trade on transatlantic air routes.

### ***Limitations to foreign investment***

Aside from the limitations on national security grounds imposed by the Exon-Florio amendment (mentioned above), a number of additional restrictions on foreign investment remain, notably in the shipping, energy and communications sectors. In addition, various US laws provide for conditional national treatment, notably in relation to subsidies in the area of science and technology research.

### ***Tax measures***

Concerns about federal tax measures focus on the nature of reporting requirements and the specific manner for calculating what is due. The EU deems State "world-wide" unitary taxes as inconsistent with US obligations under its tax treaties with third countries.

### ***Intellectual property***

Despite a number of positive changes in US legislation following Uruguay Round commitments, problems remain due to discrepancies between US legislation and other international commitments. Issues such as those related to the recognition of "moral rights" to authors or government use of patents have not been resolved. The continued use of EU geographical indications on US products, particularly in the wine sector, is the source of considerable frustration for EU producers. In addition, the US has been condemned in dispute settlement cases related to US intellectual property legislation: *Section 110(5) of the US Copyright Act* (concerning licensing of music works) and *Section 211 of the Omnibus Appropriations Act* (on protection of trademarks). Moreover, the co-existence of fundamentally different patent systems (US first-to-invent system versus first-to-file system followed in the rest of the world) continues to create considerable interface problems for EU companies, not to speak of the financial effects of high administrative and litigation costs in patent matters.

### ***Services***

#### Professional services

The implementation of the GATS schedules for professional services has resulted in some improvement in market access. However, a number of problems, especially owing to regulation at the State level, remain to be tackled in order to secure more transparent and open access to the US market.

#### Communication services

The GATS Basic Telecommunications Agreement in force since February 1998 has led to significant commitments on market access. Nonetheless, the EU remains concerned about the considerable barriers that EU and foreign-owned firms wishing to get access to the US market still face (e.g. investment restrictions, lengthy proceedings, conditionality of market access, and reciprocity-based procedures). A particular example is the current restrictions on access to the satellite communications operators' market in the US, though problems also exist in a number of other areas. This situation is not in line with the open market access policy advocated by the US and provides a competitive advantage to the significant number of US companies that have already access to the European market in this field.

#### Air transport services

A number of issues continue to create problems including foreign ownership restrictions and restrictions related to US public procurement. In addition, the measures recently adopted on aviation security, as well as the large scale governmental financial assistance provided to US air carriers (see above), are also of EU concern.



Maritime transport services

Foreign-built vessels are prohibited from engaging in (direct or indirect) coastwise trade (*Jones Act*), and cannot be documented and registered for dredging, towing or salvaging. In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes are shipped on US-flagged ships. Finally, the recent bilateral security measures adopted are of EU concern, since they would seem to inevitably result in discrimination between ports and Member States of the WTO over a significant, even if limited, period of time.

***Lack of prompt compliance with WTO rulings and recommendations***

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, as expressed by Article 3 of the Dispute Settlement Understanding (DSU). However, the US has a rather poor record of compliance with recommendations and rulings formulated by the Dispute Settlement Body (DSB) on the basis of Panel and Appellate Body findings. The longest standing example of non-compliance by the US is the *Foreign Sales Corporations* case.

## **3 EXTRATERRITORIALITY AND UNILATERALISM**

### **3.1 Extraterritoriality**

The application of US legislation outside the US territory is a long-standing feature of the US legal system manifesting itself in fields such as environment, banking and export control. While the EU may share some of the objectives underlying such laws, it is opposed, as a matter of law and principle, to the extraterritorial application of such domestic legislation insofar as it purports to force persons present in – and companies incorporated in – the EU to follow US laws or policies outside the US and merely to protect US trade or political interests. In particular, the EU opposes the extraterritorial provisions of certain US legislation that hampers international trade and investment by seeking to regulate EU trade with and investment in third countries.

#### ***Helms-Burton Act***

On 12 March 1996, President Clinton signed into law *the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996* (referred to as the “Helms-Burton Act”). This was the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620 (a) of the Foreign Assistance Act of 1961; further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992). The Helms-Burton Act *inter alia* (a) allows US citizens to file lawsuits for damages against foreign companies investing in confiscated US (including Cuban-American) property in Cuba (Title III of the Act) and (b) requires the US Administration to refuse entry to the US of the key executives and shareholders of such companies (Title IV of the Act). The EU is of the view that these measures are contrary to US obligations under the WTO Agreements, in particular the GATT and GATS. In that respect, the EC initiated a WTO dispute settlement procedure on 3 May 1996.

#### ***Iran and Libya Sanctions Act***

On 5 August 1996, the *Iran and Libya Sanctions Act* (referred to as “ILSA”) was signed into law. Despite strong opposition from the EU, ILSA was extended by another period of 5 years on 3 August 2001. The legislation provides for mandatory sanctions against foreign companies that make an investment above US\$20 million contributing directly and significantly to the development of petroleum or natural gas resources in Iran and Libya.

#### ***EU opposition***

The EU has forcefully expressed, through a number of representations and *démarches*, its opposition to this kind of legislation- or any secondary boycott and sanction legislation having extraterritorial effects.

Furthermore, on 22 November 1996, the EC adopted Council Regulation 2271/96 (the so-called “Blocking Statute”) with a view to protecting the EU and its economic operators, against the effects of extra-territorial legislation of this sort adopted by third countries. Other trading partners of the US, such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

### *Understandings reached with the US*

On 11 April 1997, an Understanding was reached with the US concerning the Helms-Burton Act and the ILSA, as well as the EC's WTO case regarding the former. The Understanding charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. As regards ILSA, the Understanding stipulated "the US will continue to work with the EU towards the objectives of meeting the terms" under the legislation which would permit the US President to waive the application of sanctions for EU Member States and EU companies. The EC agreed to suspend its WTO case, but reserved the right to restart or to re-launch the WTO dispute settlement procedure, if action was taken against EU companies or individuals under the Helms-Burton Act or ILSA, or waivers as described in the Understanding were not granted, or were withdrawn.

At the 18 May 1998 EU-US Summit in London, building upon the April 1997 Understanding, the EU and the US reached an Understanding on a package of measures to resolve the dispute regarding the Helms-Burton Act and ILSA. The Understanding offers the real prospect for a permanent solution, but still depends on acceptance by the US Congress before full implementation may take place. The Understanding contains three main elements.

The first element is the Understanding on investment disciplines. It contains a clear commitment on the part of the US Administration to seek from Congress the authority to grant a waiver from Title IV of the Helms-Burton Act (visa restrictions) without delay. With respect to Title III of the Helms-Burton Act (submission of lawsuits against "trafficking in expropriated property"), the Understanding provides for a US commitment to continue to waive the right of US citizens to file lawsuits. Contrary to the Understanding, neither the waiver under Title IV nor a permanent waiver under Title III was granted. However, the Understanding waivers under Title III were granted on a six-monthly basis and no action was taken, so far, against EU citizens or companies under Title IV, although the US Administration continues to investigate certain EU company's investments in Cuba. The existence of the Helms Burton Act and the lack of permanent waivers under Titles III and IV continue to constitute an on-going threat to EU companies doing or intending to do legitimate business on Cuba.

The second element is the Transatlantic Partnership on Political Co-operation (TPPC), which should be seen in conjunction with the EU's efforts vis-à-vis US Administration to restrain its use of unilateral sanctions with extraterritorial effects, so-called "secondary boycotts". The TPPC states that the US Administration will "not seek or propose, and will resist, the passage of" such sanctions legislation.

The last element of the Understanding relates to the ILSA. At the London Summit in 1998, the US Administration did not grant the EU a multilateral regime waiver as foreseen by the Understanding of 11 April 1997. However, the US determined, under Section 9(c) of ILSA, to waive the imposition of sanctions against a major EU investment project in gas exploration in the South Pars field in Iran and committed that similar cases could be expected to be granted similar waivers.

The Understanding reached at the May 1998 Summit in no way softens the EU's position that the Helms-Burton Act and ILSA are contrary to international law. The EU never acknowledged the legitimacy of these Acts and fully reserved its right to resume the WTO case against the Helms-Burton Act

Full implementation depends on congressional support, which appears not to be forthcoming. The EU and its Member States can only fulfil the European commitments once the presidential waiver authority has been fully exercised.

### ***Iran Non-Proliferation Act***

On 14 March 2000, the *Iran Non-Proliferation Act* (INPA) was signed into law. It provides for discretionary sanctions against foreign companies transferring to Iran goods, services and technology listed under the international export control regimes, as well as any other item prohibited for export to Iran under US export control regulations, as potentially contributing to the development of weapons of mass destruction.

INPA constitutes extraterritorial legislation, for on the one hand, it allows the US Administration to apply its own sanctions to exports which are subject to EU Member State and EU export control regimes, while on the other hand, it unilaterally expands the scope of export controls on EU exports beyond those multilaterally agreed upon. Its adoption is incompatible with the US commitment under the TPPC to resist the passage of extraterritorial sanction legislation.

EU concerns were repeatedly expressed in the run-up to the adoption of this Act. Taking these into account, then President Clinton issued a statement when signing the Bill into law, undertaking to work with Congress in order to seek to rationalise the reporting requirements on transfers deemed legal under the applicable foreign laws and consistent with the multilateral export control regimes. The EU continues to expect that the Bush Administration will take the appropriate steps to repeal the threat of sanctions against EU entities.

Several other instances and variations of US extra-territoriality can be found in, *inter alia*, various environmentally driven embargoes (see section on import prohibitions), export control legislation (see section on export restrictions) as well as, at the sub-federal level, selective purchasing laws (see section on government procurement).

## **3.2 Unilateralism**

Unilateralism may take the form of either unilateral sanctions or retaliatory measures against “offending” countries, or companies. These measures are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can lead also to bilateral agreements with elements of discrimination.

### ***Sections 301-310 of the 1974 Trade Act***

The “Section 301” family of legislation provides a striking example of unilateral trade legislation that has been used on numerous occasions against the EU. *Section 301 of the 1974 Trade Act*, as amended by the *Omnibus Trade and Competitiveness Act of 1988* (hereafter, 1988 Omnibus Act), authorises the US Government to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US Government deems to be discriminatory or unjustifiable and restrict US commerce.

The 1988 Omnibus Act also introduced the so-called “*Super 301*” provision, a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. President Clinton renewed Super 301 by Executive Order in March 1999, extending it until the end of 2001. However, once this order expired, the Bush Administration has decided not to renew it.

In addition, *Title VII of the 1988 Omnibus Act* relating to the removal of government procurement barriers was renewed. Under this law, the US decided in 1993 to impose sanctions against the EU and certain Member States for failure to liberalise purchases of telecom equipment (see Section 5.7 of the Report “Government Procurement”).

Furthermore, the 1988 Omnibus Act introduced a “*Special 301*” procedure targeting intellectual property rights protection outside the US. Under Special 301, the USTR has created a “priority watch list” and “watch list” to identify “priority” foreign countries that are deemed to deny adequate and effective protection of intellectual property rights. Countries placed on the “priority watch list” are the focus of increased bilateral attention and the USTR officially initiates investigation procedures that may eventually result in unilateral trade measures. The “watch list” is reserved for those countries that do not protect US intellectual property or that deny market access to IPR-related industries. The EU is currently on the “priority watch list” of the 2002 “Special 301” review concerning EC Regulation 2081/92 governing the protection of geographical indications for agriculture products and foodstuffs and for the presumed inadequate protection of data exclusivity (Article 39.3 of TRIPS). Furthermore, Greece, and Italy are still on the “watch list”, as are several candidate countries.

The US has resorted to unilateral action, even since the WTO Uruguay Round Agreement entered into force on 1 January 1995. In the bananas and beef-hormones cases, in order to comply with the time limits imposed by the Section 301 legislation, the US did not use the obligatory procedure provided by the DSU to solve its disagreement with the EU over whether the EU was in conformity with WTO rules. Instead, the US directly requested the WTO to authorise it to suspend concessions against the EC, in violation of normal WTO procedures.

The EC challenged Section 301 legislation, as it mandates the USTR to take this kind of unilateral action within time frames that in certain cases cannot possibly comply with WTO rules. This is particularly relevant in cases where the US should follow the procedure of Article 21.5 DSU to resolve disagreements over the WTO compatibility of measures taken by other Members to implement panel rulings.

A WTO Panel ruled on 8 November 1999 that the statutory language of Sections 301 to 310 of the 1974 Trade Act was as such inconsistent with the rules of the WTO DSU. However, because the US administration through a Statement of Administrative Action had undertaken to always act in a manner consistent with the US obligations under the WTO, the panel concluded that as long as the undertaking was respected, no violation was taking place. The practical result of this ruling has been to make Sections 301-310 ineffective against WTO members.

Nevertheless, in cases where bilateral (as opposed to WTO) agreements are alleged to have been violated, Section 301 is still regularly used as a unilateral trade policy instrument. Under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation.

### ***The "Carousel" Legislation***

*Section 407 of the Trade and Development Act of 2000* (so-called “Carousel” law), enacted on 18 May 2000, provides for a mandatory and unilateral revision of the list of products subject to suspension of GATT concessions 120 days after the application of the first suspension and then every 180 days thereafter, in order to affect imports from Members which have been determined by the US not to have implemented recommendations made pursuant to a WTO dispute settlement proceeding. The EU believes that such legislation is fundamentally at odds with the basic principles of the DSU and, therefore, requested WTO consultations, which were held on 5 July 2000. The EC will immediately request the establishment of a WTO panel against US legislation as soon as sanctions are rotated.

## 4 **TARIFF BARRIERS**

### 4.1 **Applied Tariff Barriers**

#### *Tariff peaks*

Despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the US retains a number of significant duties and tariff peaks in various sectors including food products, textiles, footwear, leather goods, jewellery and costume jewellery, ceramics, glass, trucks and railway cars.

#### *The Information Technology Agreement*

With regard to information technology (IT) products, the *Information Technology Agreement* (ITA) providing for the complete elimination of tariffs by the year 2000 on a large number of products was implemented as of July 1997. The main elements of the new US tariff structure eliminate tariffs on all semiconductors, computers, computer peripherals and computer parts, electronic calculators, telecommunication equipment, electronic components (capacitors, resistors, printed circuits), semiconductor testing and manufacturing equipment and certain consumer electronic items. Although tariffs on optical fibre cables were eliminated under the ITA, the US refused to do the same for optical fibres on which they maintain a rather substantial protection. Tubes for computer monitors are excluded also. Attempts to broaden the scope and coverage of products of the ITA in the form of the ITA II have so far failed.

#### *Retaliatory measures in the context of the Beef Hormones dispute*

The decision by a WTO panel of August 1997 that EC measures against hormones in beef were not in compliance with WTO rules was submitted to the Appellate Body in September 1997. The Appellate Body overruled the earlier panel but recommended that the EC bring its measures into conformity with obligations under the Agreement on Sanitary and Phytosanitary Measures (SPS).

Following the deadline of 13 May 1999 imposed by the Arbitrator for the EU to implement those recommendations and the request by the US to the WTO DSB to allow the suspension of tariff concessions to the EC, the WTO Arbitrator determined that the level of impairment suffered by the US was \$116.8 million. The US suspended the application of tariff concessions by imposing a 100% *ad valorem* rate of duty on a list of mainly agricultural products from 29 July 1999 onward.

While these sanctions remain, the EC and US are engaged in consultations to replace those sanctions by compensation in the form of increased imports into the EU of US non hormone-treated beef. In addition, the European Commission has made a proposal for an amendment of EC legislation with the objective of bringing it into alignment with the WTO ruling.

#### *Ceramics and Glass*

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively higher in the US than in Europe. During the Uruguay Round the US rejected the EU's offer to abolish tariffs in this sector, even though Mexico, one of Europe's leading competitors in the US market, should, after a transitional period, enjoy a zero rate by virtue of the NAFTA. There are products of importance for EU trade which will continue to be confronted by high tariffs even when the Uruguay Round reductions have been fully implemented. These include hotel and restaurant ware, on which the duty rates currently are

30% if made of porcelain or china and 31.5% for others, and certain drinking glasses and other glassware on which the duty rates currently are 33.2% and 38% respectively.

### ***Textiles and Leather***

The average trade weighted reduction made by the US in the Uruguay Round was 12% for textiles and clothing (to be implemented over ten years) and 5.2% for footwear. This means that many significant tariffs and tariff peaks will remain on products of export interest to the EU even when the Uruguay Round reductions have been implemented fully. These include:

(a) certain woollen fabrics and articles of apparel for which duty rates in 2002 reach 27.6% plus a specific rate of 9.7 cents/Kg in certain fabrics and 32.5% for some apparel and

(b) several footwear products for which the current duty rates are 48%, or 37.50% plus a specific rate of 90 cents/pair.

### ***Jewellery***

The US jewellery sector is protected by an average tariff of 6% with the highest post Uruguay Round tariff being 13.5%. The corresponding EU rates stand between 2.5% and 3%. Furthermore, the US maintains very significant import duties on certain semi-finished products made of precious metals. The very high raw material cost in this sector means that even modest tariff barriers reduce significantly the access of EU jewellery to the US market.

### ***Automotive***

A customs duty of 25% was placed on vehicles for the transport of goods with a weight greater than 5 tonnes but less than 20 tonnes.

### ***Agriculture***

A levy on dairy imports is to be introduced under the *2002 Farm Act*. While this levy is ostensibly to be used for promotion, it could be applied in a manner to act as a tariff increase.

## **4.2 Tariff Quotas**

### ***Agriculture***

The import of certain agricultural products into the US takes place mainly under WTO bound tariff quotas. The EU is monitoring closely the management of such quotas.

The EU remains concerned about certain in-built rigidities in the import licensing system for dairy products. This is in part based on historical trading and results in some licences being awarded to companies who no longer trade in milk products. The division of quotas for certain cheeses into Tokyo Round quantities and Uruguay Round quantities fragments access and complicates license applications by traders. Although the US Department of Agriculture's (USDA's) Economic Research Service (April 2001) identified inefficiencies in this type of quota administration, it continues in operation.

### ***Possible tariff quota on casein and Milk Protein Concentrates (MPC)***

The EU is concerned at the continuing attempts to introduce legislation through Congress that would limit imports of casein and Milk Protein Concentrates to a level that would be substantially lower than the level of imports today. This protectionist action is being considered in spite of the fact that these products are not being produced in the US and are not in direct competition with US dairy products. Should the sister bills currently under consideration in Congress come into force, it would amount to a breach of US commitments under the WTO and would trigger the withdrawal of equivalent concessions by those trading partners affected or alternatively would require equivalent compensation by the US.

## **5 NON-TARIFF BARRIERS**

### **5.1 Registration, Documentation, Customs Procedures**

#### ***Excessive invoice requirements***

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because US Customs are entitled to ask for all necessary supplementary documents and information during clearance (as provided for by the Kyoto Convention). There should be no systematic demand for this kind of information. These formalities are also burdensome and costly, thus constituting a barrier against new entrants and small companies. As a result, large established suppliers are privileged and small and new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets that are of special relevance for the EU.

#### ***Lack of recognition of the EC as a Customs Union***

US Customs does not recognise the EC as a country of origin and refuses to accept EC certificates of origin. This means that in order to justify EC country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures, which can be a source of additional costs. The Transatlantic Business Dialogue (TABD) has urged the US to recognise a simple EC origin. US Customs noted this issue extends the scope of customs policy and that inter-agency consensus did not yet exist (due in part to resistance from USTR). Some US industries and organised labour opposed the change while other business had cost concerns (i.e. marketing). For example, tyres imported into the US are required by law to be labelled with their country of origin. If tyres marked "made in the EC" were accepted, market access would be improved and trade less onerous.

Further evidence of the lack of recognition of the EC as a customs union is the fierce US opposition to the EC request to amend the Brussels Convention, creating the WCO, in order to allow it to accede to the Organisation, where it currently has merely an observer status. The main task of the WCO is to enhance the effectiveness and efficiency of Customs administrations by developing and maintaining harmonised international customs standards in the field of areas of mainly exclusive EC competence. In addition, the current situation is not coherent with the full member status of the EC in the WTO, which also deals with several customs issues. Therefore, the US opposition to the EC's accession to the WCO hinders appropriate co-ordination and presentation of customs issues in the WCO as far as the EC is concerned, thus provoking unnecessary delays or barriers as regards the adoption of important measures relating to commercial exchanges.

#### ***Container Security Initiative (CSI)***

The US has launched a *Container Security Initiative (CSI)* as a response to US concerns involving potential terrorist threats to the international maritime container trade system. The CSI consists of four elements: security criteria to identify high-risk containers; pre-screening containers before they arrive to US ports; using technology to pre-screen high-risk containers and developing and using smart and secure containers. The US Customs Service has launched the system to achieve a more secure maritime trade environment while attempting to



accommodate the need for efficiency in global commerce. Ports participating in the CSI use technology to assist their officers in quickly inspecting high-risk containers before they are shipped to US ports. Imports in the US from CSI ports will be facilitated in such a way that the screened containers, marked as safe, need not the same level of control in the US. The US is introducing the system in different steps, starting with 20 "mega-ports" all over the world. So far, five EU ports (Rotterdam, Le Havre, Antwerp, Bremerhaven and Hamburg) have signed a declaration of principles with the US Customs Service to introduce CSI in their ports as well as an agreement on stationing US Customs officials in their ports.

At the G8 summit in Kananaskis in June 2002, G8 members agreed to work jointly on a common model approach for container security, which would provide increased security and eliminate a number of potential problem areas. Once approved, the model could also serve as a pilot-project and as an example for discussions in other international organisations such as the WCO and the International Maritime Organisation (IMO).

The Commission supports the objectives of the US initiative as accepted at G8 level and intends to closely co-operate with the US to ensure proper and reciprocal implementation of the system. The responsibilities between the partners have to be clearly determined and any arrangement must be developed in a way that allows integration in a worldwide system to be developed through international organisations like the WCO. One of the concerns of the Commission is that due to the introduction of the CSI in different steps, starting with mega-ports, the system could lead to the distortion of traffic and transport and trade patterns threatening the functioning of the single market. New traffic flows and trade patterns could be established, which would most probably be maintained even after an extension of the CSI to all ports. The US has concluded bilateral agreements with a few selected ports. Ships and container traffic coming from these ports should get more advantageous treatment at arrival in the US. The CSI might therefore initially have a significant impact on trade patterns and disrupt the overall transport system by concentrating traffic flows in already congested parts of Europe. It is therefore of utmost importance to ensure from the very beginning close co-operation between the Commission and the US to minimise these risks even if the system is introduced firstly in a small number of ports.

### ***Textiles and Leather***

Customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information. These requirements lead to additional costs and in some cases include confidential processing methods (type of finishing, of dyeing, etc.). Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component; for outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

The extension of the liquidation period up to 210 days also functions as an important trade barrier. Apparel articles often have a short life span (e.g. fashion items must be sold within 2 to 3 months) and therefore have to be marketed immediately. Consequently, the retailer or the importer is often not in a position to re-deliver the goods upon Customs request, in which case Customs applies a high penalty (100% of the value of the goods). According to importers, Customs may extend the liquidation period beyond 210 days without giving a detailed motivation. In some cases a minor problem or error in invoice is sufficient. In addition, during the liquidation period, Customs may still request any additional information necessary to establish the classification and the country of origin.

### ***Fisheries***

The US has introduced a compulsory system of certificates of origin for yellowfin tuna caught in the Eastern Tropical Pacific since July 1992. Certification rules are also applied for countries using large-scale trawl nets.

In addition, the *US Code, Title 46, Shipping, Section 12108*, blocks the potentially interesting possibility for EU fishermen to fish in US waters under a US flag since foreign-built US flag vessels cannot be documented with a fishery endorsement, thereby also preventing the possibility of joint ventures and joint enterprises. The *American Fisheries Act of 1998* included a provision that increased the percentage of shares in a vessel that must be held by US citizens in order for the vessel to be considered a US vessel from 50% to 75%.

## 5.2 State Level Impediments to Trade

### *Wines and Spirits*

Some State legislation, which has its origins in Prohibition era restrictions, impedes the free circulation of alcoholic beverages. The US operates a series of protectionist and monopolistic systems at State level for the distribution and marketing of wines and spirits. Rules still persist in some States that prevent cross-state retail sales of wines and spirits; prohibit EU exporters from distributing, rebottling, or retailing their own wine; require duplicate label approvals; levy fees and charges; and other procedures. The Commission is raising these concerns in the context of the on-going bilateral negotiations on an agreement on trade in wines.

## 5.3 Levies and Charges (other than Import Duties)

### *User Fees*

There is a series of user fees by which the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided.

As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The *Customs and Trade Act of 1990* and the *Omnibus Budget Reconciliation Act of 1990* modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities (facilities mainly used by importers) place foreign products at a disadvantage vis-à-vis US competition.

The most significant of the customs user fees is the *Merchandise Processing Fee (MPF)*. The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US offshore possessions. It is levied also on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% *ad valorem* on formal entries with a maximum of US\$485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

At the request of Canada and the EC, the GATT Council instituted a Panel in November 1987 that stated that the US Customs user fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an *ad valorem* system such as that used by the US. The GATT Council adopted the Panel report in February 1988.

The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely to exceed the cost of the service since it is still based on the value of the imported goods.

### ***Harbour Maintenance Tax and Harbour Services Fee***

US Customs also participates in the collection of the *Harbour Maintenance Tax* (HMT). The HMT is levied in all US ports on waterborne imports, at an *ad valorem* rate of 0.125%. Collected monies are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the *ad valorem* basis for the HMT collection makes it difficult to justify as a fee approximating the cost of the service provided. Moreover, there is a significant accumulation of unused funds, which reached US\$1.609 billion in FY1999 and is projected to rise even further. This points to the excessive nature of the HMT.

The US Court of International Trade in October 1995 ruled that under US law the HMT is a tax and not a user fee. The US Constitution prohibits taxes on exports. The US Court of Appeals confirmed this ruling in June 1997 as did the US Supreme Court in March 1998. As a result, the US authorities have stopped collecting HMT on exports. However, the HMT is still being collected on imports.

In March 1998, the EC requested WTO dispute settlement consultations to challenge the imposition of HMT on imports. Two rounds of consultations were held in Geneva on 25 March and 10 June 1998.

On 2 August 2001, a new piece of legislation was introduced by Rep. Borski in Congress to provide an alternative source of funding for the cost of maintaining public harbours and waterways. This bill would repeal the HMT and require that the aforementioned costs be paid from general Treasury Funds.

### ***Shipbuilding***

The US applies a 50% *ad valorem* tax on non-emergency repairs of US owned ships outside the US and on imported equipment for boats, including fishnets on the basis of *Section 466 of the Tariff Act of 1930*, as amended in 1971 and 1990. Under the latter amendment the tax would not apply, under certain conditions, to foreign repairs of "LASH" (Lighter Aboard Ship) barges and spare vessel repair parts or materials. However, as the "LASH" technology is not widely used outside the US, the exemption is of limited relevance. The implementing legislation of the *OECD Shipbuilding Agreement* would have made appropriate provision for abolition of this tax as applicable to the contracting parties of the Shipbuilding Agreement.

### ***Automotive***

The US levies the following three taxes/charges on the sales of cars in the US that raise concern to European automakers: the Luxury Tax, the Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax.

The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around US\$40,000. The tax has a higher incidence on imported cars than on US produced cars. Originally it also applied to leisure boats and jewellery but these items were later exempted due to pressure from US producers. The luxury tax is scheduled to be eliminated in 2003, with the tax levied falling from 4% in 2001 to 3% in 2002.

The CAFE payment is a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level, currently 27.5 miles per gallon (mpg). CAFE favours large integrated automakers or producers of small cars rather than those who concentrate on the top end of the car market, such as importers of European cars.

The so-called Gas Guzzler Tax is an excise tax of US\$1,000 - 7,700 per car, levied on all cars not meeting fuel economy standards set by the US Environmental Protection Agency (EPA), currently 22.5 mpg. This fuel economy cut-off point is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

According to the latest estimate available, European-based automakers, with a total market share in the US of only 6%, bear nearly 70% of the revenue generated by the luxury tax, 85% of that by the Gas Guzzler tax and almost 100% of the CAFE penalties.

## 5.4 Import Prohibitions

### *National Security based restrictions*

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes.

Under *Section 232 of the Trade Expansion Act of 1962*, US industry can petition for the restriction of imports from third countries on the grounds of national security. Protective measures can be used for an unlimited period of time. The Department of Commerce (DoC) investigates the effects of imports that threaten to impair national security either by quantity or by circumstances. Section 232 is supposed to safeguard US national security, not the economic welfare of any company, except when that company's future may affect US national security. The application of Section 232 is not dependent on proof of injury to US industry.

In the past, the EU has voiced its concern that Section 232 gives US manufacturers an opportunity to seek protection on grounds of national security, when in reality the aim is simply to curb foreign competition. On 1 February 2001, the DoC initiated an investigation to determine the effects on national security of imports of iron ore and semi-finished steel. The DoC released its report on 9 January 2002, which found that imports of iron ore and semi-finished steel do not threaten to impair US national security. Therefore no action under Section 232 to adjust the level of imports was recommended to the President.

### *Agriculture and Fisheries*

#### The 1972 Marine Mammal Protection Act

The *Marine Mammal Protection Act of 1972* (MMPA) aims at protecting marine mammals, particularly dolphins, by progressively reducing the acceptable level of dolphin mortality in US tuna-fishing operations in the Eastern Tropical Pacific (ETP) Ocean and providing for sanctions to be taken against other countries which fail to apply similar standards.

The MMPA requires that countries that wish to import from the ETP must receive an "affirmative finding" from the National Marine Fisheries Service (NMFS). The criteria for receiving an "affirmative finding" relate to the membership (or launching and completing the accession within six months) to the Inter-American Tropical Tuna Commission (IATTC) and the need to have a "tuna tracking and verification system" that conforms to the Tuna Tracking and Verification System adopted under the Agreement for International Dolphin Conservation Programme (AIDCP).

The EU is provisionally applying AIDCP and is in the course of introducing the legislation regarding a tuna tracking and verification system. The EC has requested to become party to the IATTC but this is pending the signature and ratification by all parties to the Agreement of a protocol to the agreement that would allow the Commission to join the IATTC. However, this has taken longer than the six months foreseen in the US legislation due to reasons beyond the control of the EU. Therefore, as the EC has not met the requirement of membership to the IATTC, nor has in force a tuna tracking and verification system, it cannot receive an "affirmative finding" to enable it to import tuna products from the ETP into the US.

### Shrimp/Turtle Legislation

Pursuant to *Section 609 of Public Law 101-162*, exports of shrimp to the US will be embargoed unless nations can provide evidence that their shrimp trawlers match US efforts to protect sea turtles (artisanal fishing, having a sea turtle excluder program or fishing for cold-water shrimp only). The US authorities have now certified forty-two nations, but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified. Thailand, Malaysia, Pakistan and India requested the establishment of a WTO Panel (January-February 1997). The EC participated as a third party.

The Appellate Body of the WTO to some degree reversed the findings of the Panel by agreeing that the US measure served an environmental objective recognised as legitimate under GATT Art. XX(g), but the measure had been applied by the US in a manner that constitutes an arbitrary and unjustifiable discrimination between members of the WTO where the same conditions prevail. The Appellate Body further stressed that the US should have consulted and negotiated with the other countries involved and tried to reach a multilateral agreement on turtle protection. Finally, the Appellate Body concluded that the US authorities should bring its measure into conformity with the obligations of the US under the GATT Agreement.

In July 1999, the US Department of State issued revised guidelines for the implementation of Section 609. These guidelines set forth the measures the US would take to implement the recommendations and the previous rulings of the DSB.

On 12 October 2000 Malaysia requested a Panel to consider whether the US had correctly implemented the earlier ruling in the "shrimp-turtle" dispute. The panel issued its report on 15 June 2001. The Panel found that the measure adopted by the US in order to comply with the recommendations and rulings of the DSB violated Article XI.1 of the GATT 1994 but that *"in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the US authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied."* The Panel noted also that *"should any one of the conditions referred to in sub-paragraph 6.1(b) above cease to be met in the future, the recommendations of the DSB may no longer be complied with."* Following Malaysia's appeal on 23 July 2001, the WTO Appellate Body confirmed the Panel's finding in a report issued on 22 October 2001.

### Restrictions on Imports of Dairy Products

The import of dairy products made from unpasteurised milk such as soft cheese, for which there is a ready market in the US is generally prohibited, even though a number of US States permit the production and marketing of such products. The import of fresh dairy products, such as yoghurts, is effectively prohibited through the application of the *Import Milk Act*.

The import of milk protein into the US is generally permitted. The EU has a substantial export to the US of milk protein used by especially the meat and bread industries in their processing. The most obvious customer, the yoghurt industry is, however, not allowed to use imported proteins, unless they originate in industries that are Grade A approved by the US authorities. No EU dairy is Grade A approved, and it seems impossible to become Grade A approved. Numerous meetings with the FDA have not solved the problem.

Under the 2002 Farm Act, a dairy import levy may be charged. While this is essentially for promotional funding, since imported products are subject to quotas, no expansion of sales would be possible and the levy would therefore act as an increased tariff.

## 5.5 Standards and Other Technical Requirements

EU exporters to the US market face steep barriers of regulatory nature. The main aspects of the US regulatory policy which pose difficulties for EU exporters are the following:

### *Complex Regulatory System*

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Though in general, not *de jure* discriminatory, the complexity of US regulatory systems can represent an important structural impediment to market access. For example, it is not uncommon that equipment for use in the workplace is subject to US Department of Labour certification, a county authority's electrical equipment standards, specific regulations imposed by large municipalities, and other product safety requirements as determined by insurance companies.

This situation is aggravated by the lack of a clear distinction between essential safety regulations and optional requirements for quality, which is due in part to the role of some private organisations as providers of assessment and certification in both areas. Moreover, for products where public standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

The *WTO Agreement on Technical Barriers to Trade* (TBT) covers the rules for standards, technical regulations and conformity assessment procedures. The TBT is applicable to all WTO Members, and provides, *inter alia*, that its Members must use international standards as the basis for their technical regulations, standards and conformity assessment procedures. If international standards are not used and the technical regulations or conformity assessment procedures proposed have a significant effect on trade, WTO members have to notify them giving, thus, the opportunity to other Members to comment and, in any case, to companies to adapt on time to new regulations or conformity assessment procedures. However, it provides for certain exceptions for specific, legitimate objectives, such as protection of human health and safety, plant and animal health, and protection of the environment, where the international standards are inadequate for the purpose. The TBT Agreement is intended to ensure that technical regulations and conformity assessment procedures are not more trade restrictive than required for the legitimate purpose of the regulations concerned and the risks they are designed to cover.

The EU believes that the TBT provides an excellent base on which to tackle technical barriers to trade at the multilateral level. It specifies stricter disciplines in many of the areas of concern discussed below, such as the use of international standards, labelling requirements and sub-federal standards. It provides also for further bilateral follow-up actions. In this context, the EU and US concluded a *Mutual Recognition Agreement*, in force on 1 December 1998. Its objective is to facilitate EU-US trade by permitting manufacturers to test and certify their products with a domestic conformity assessment body (CAB) according to the requirements of the other Party. In addition, voluntary *Guidelines for Regulatory Co-operation* have been drawn up to improve co-operation between regulators and to promote transparency for all stakeholders. Following the adoption of those guidelines, the Commission and the US Government will consider the implementation of pilot projects in particular areas.

### *Non-use of international standards*

A particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardising bodies. All parties to the TBT are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, and some are indeed widely used

internationally, very few international standards are adopted directly and some US standards are in direct contradiction to them. The EU has attempted to clarify some of these issues in discussions in the TBT Committee in Geneva, and in particular, to establish the position of international standards bodies in the context of the TBT, but agreement with the US has been difficult to reach. Discussions in the WTO on conformity assessment issues are progressing but are at an early stage.

US standards for *Non-destructive testing* (NDT) serve as an illustrative example of the non-use by US authorities of international standards.

In the field of pressure equipment and indeed in an even wider area, non-destructive testing (NDT) is an important element in ensuring product safety. A main requirement is the certification of the personnel that are to perform the NDT.

While the ISO Standard ISO 9712 on this matter has been supported by the American National Standards Institute (ANSI), the standard is not recognised in the context of the American Society of Mechanical Engineers (ASME) code on pressure vessels. As the ASME code plays an important role outside the US, this fact is of very significant relevance not only with regard to European manufacturers producing for the US market but also European manufacturers active in other parts of the world, even for sale of ASME-compliant pressure vessels within Europe.

In practice this means that NDT personnel in Europe need to be double-certified: once for ISO 9712/EN 473 and once again for ASME-NDT. This is inefficient, as the technical requirements of the NDT certification itself are in essence rather similar. The only substantial difference is that whereas in the ISO/EN case the test is performed by a competent third party, ASME requires the test to be performed in an ASME-proprietary fashion.

Apart from asking ANSI to ensure that the ISO 9712 is properly implemented in the US Pressure vessels code, the European Federation of non-destructive testing (EFNDT) submitted to ASME in October 1999 a code case (i.e. detailed wording of the proposal) to amend the corresponding section of the ASME code. Regrettably, no progress has been made since.

#### ***Excessive reliance on mandatory certification***

Against the background of an international trend towards deregulation or the minimising of third party intervention in the regulatory process, one problem experienced in the US is the continued reliance on third party conformity assessment procedures for many industrial products.

In several sectors, such as that of electrical equipment and domestic appliances, technological development and consumer awareness have permitted public regulators around the world to reduce the extent of pre-marketing third party testing and certification in favour of self-certification by manufacturers backed up by post-market surveillance and control. In the US however, third party certification in these sectors is still mandatory (*de jure* and/or *de facto*), and as such poses disproportionately high costs on suppliers to the US market

#### ***Regulatory differences at State level***

There are more than 2700 State and municipal authorities in the US that require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent. In particular, individual States sometimes set environmental standards going far beyond what is provided for at Federal level. Agricultural and food imports (particularly wines) are also often confronted with additional state-level requirements.

Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one, as at present there is no central source of information on standards and conformity assessment. One company has estimated the volume of lost sales in the US due to the multiplicity of standards and certification problems to be about 15% of their total sales. The expense of certification

alone was put at 5% of total sales, as was the amount spent on product liability insurance (a far less significant factor in Europe).

The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components that have already been individually tested and certified. This is particularly the case for electrical products.

In addition, the private organisations providing quality assurance may impose the use of certain specific product components under their own programmes that are not in conformity with international quality assurance standards (such as the ISO 9000 series). In some cases (e.g. telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

For electrical appliances, Underwriter's Laboratories (UL) have complete discretion on the standards concerning safety certification and occasionally can make seemingly arbitrary changes to them. UL list the products that comply with the applicable standards, but do not approve them. This is done by a variety of competing testing and certification agencies, some offering testing facilities in the EU.

For example, in early 1993 UL revised standard 1028 on hair clipping and shaving appliances, amending the specifications for the on/off switch. The new UL requirement adds nothing to the safety of these appliances, but adds considerable costs to European manufacturers. It has also required the subsequent modification of the related International Electrotechnical Commission (IEC) standards (endorsed by the Comité Européen de Normalisation Electrotechnique (CENELEC) [European Electrotechnical Standards Committee]).

#### ***Excessively Burdensome Labelling Requirements***

US labelling and product description requirements, in particular for textiles, are often unnecessarily cumbersome. In addition, detailed information required about the country of origin of components of some products, such as automobiles, is aimed at favouring consumption of products of US origin.

Some of the particular technical barriers encountered by EU exporter to the US market in specific sectors are described below.

#### ***Electrical and Electronic Equipment***

Trade in electrical and electronic equipment is a significant ingredient in EU-US commercial relations. This product category amounts to 6% of total EU exports to the US. European exporters of electrical and electronic equipment and appliances face steep barriers to market their products on the US market.

First, there is not a single US market for electrical and electronic products -- partially divergent federal, regional, state, sectoral and even county and city technical regulations, procurement specifications and product standards split up the market. It is not sufficient to comply with federal regulations and obtain clearance from US Customs to market electrical and electronic equipment in the US. The information on import conditions received by European equipment exporters from US embassies, chambers of commerce abroad and Customs often proves insufficient and inadequate. The *de facto* fragmentation of the US market forces exporters to make expensive adaptations of their product models and type approvals to local and sectoral requirements, undermining the economies of scale that sales on a unified marketplace of the size of the US market would otherwise make possible.

Second, besides diverging among themselves, the standards on electrical and electronic products used in the US diverge most often from international IEC standards. These international standards are applied not only in Europe but in a great majority of third countries too. As a consequence European exporters cannot export to the US the electrical and electronic models that they sell to the rest of the world. Moreover, the US actively seeks to



deflect countries with which it has particularly intense trade in electrical and electronic equipment from the path of international standardisation. In 2001, this campaign to undermine the use of international standards in third countries has increased, especially in Latin America. The EU would like to see a more unambiguous commitment on the part of the US for IEC standards.

Third, despite the fact that technological development and consumer awareness in this sector favours self-certification by manufacturers, backed up by post-market surveillance and control, third party certification of electrical equipment and appliances is still mandatory in the US market. This is probably the single most burdensome barrier to entry of European electrical equipment and appliances. Since those products can be marketed in the EU with the manufacturer's self-declaration of conformity, there is an uneven playing field in the EU-US trade of electrical goods.

Finally, it must be noted that the Commission has decided to propose to the Council the suspension of the *Annex for Electrical Safety to the EU-US Mutual Recognition Agreement (MRA)*, since all attempts to develop practical solutions and confidence building measures have been rejected by the Occupational Safety and Health Administration (OSHA). Under the MRA, European designated laboratories should certify equipment according to US regulations. The OSHA has continuously denied European authorities the right to designate European laboratories to operate under the Annex on Electrical Safety and this behaviour has nullified the benefits of the MRA in this sector.

#### ***Telecommunication equipment***

As far as IT products are concerned, since they are subject to continuous testing and assessment in their development and production process, it should be unnecessary to repeat such tests by a third party. Industry stresses the advantages of an appropriate "supplier declaration of conformity". US regulatory agencies have begun a review of this approach, and are moving in certain instances towards manufacturer's declarations of conformity (PCs, VCRs, for example).

The Federal Communications Commission (FCC) has regulated its requirements for terminal equipment attachment (much in line with the regulatory approach used in the EU). However, the FCC continues to require third party certification of radio transmitters that have also been deregulated in the EU in terms of technical product requirements and approval procedures. The FCC should therefore be encouraged to move toward a "suppliers declaration of conformity" for radio transmitters; otherwise an unbalanced market access situation between the EU and the US will persist.

#### ***Automotive***

The *American Automobile Labelling Act* provides that passenger cars and other vehicles must be labelled with, *inter alia*, the proportion of US and Canadian-made parts and the final point of assembly. These requirements are intended to influence consumers to buy cars of US-Canadian origin. There is also an obligation to indicate the origin of engines and gearboxes that could discourage US manufacturers from importing parts from Europe. Moreover conforming to the labelling requirement may involve the disclosure of confidential data from non-US manufacturers.

#### ***Shipbuilding***

The production of cruise ships is almost entirely based in the EU while the most important market for cruises is the US, which makes compatibility with US rules mandatory for cruise ship manufacturers. Certain US Coast Guard regulations (i.e. Code of Federal Regulations, Title 46- Shipping) do not approve EU-made equipment on board passenger vessels due to occupational health considerations.

### ***Chemicals***

Methyl Tertiary Butyl Ether (MTBE) is used mainly as a fuel additive in petrol. There are recognised environmental risks concerning the contamination of potable water, but these are eliminated by correct storage in appropriate tanks. Following a contamination incidence, California introduced a ban on MTBE. Given the size of the market for MTBE in California, this measure, which is arguably not the correct solution to the problem, is likely to have a significant impact on international trade. The ban is currently subject to a dispute settlement case under NAFTA by Canada (*Methanex v. US*).

### ***Recreational Marine***

The EU has proposed to introduce exhaust emission and noise requirements in Directive 94/25/EC on recreational craft. This has been welcomed both by EU and US industry. At the same time the US Environmental Protection Agency (EPA) seems to consider introducing other exhaust emission values and technical requirements for recreational marine diesel engines that are far more stringent than the EU proposals. Industry has called upon EPA to harmonise their exhaust emission proposals with those of the EU.

### ***Pharmaceuticals and cosmetics***

In the US, as in Europe, a competent authority (the FDA) must approve a new medicinal product before it can be commercialised. However, the delays for non-US new medicinal products appear to be longer than for US developed medicinal products. This may be in part due to the *Investigational New Drug* (IND) system that allows the FDA advanced knowledge of medicinal products tested in clinical trials in the US.

By means of an “over-the-counter” (OTC) procedure, approved active substances for many medicinal products are put on a list (OTC-Monograph) by the FDA, so that different final products derived from these active substances can be marketed without any application or delay. However, the OTC monograph procedure requires that the active substance has a US market history. This restricts market access for OTC products with lengthy marketing experience in countries with equally sophisticated medicines regulatory systems and particularly hampers access for plant-based (herbal) medicinal products with a long tradition in Europe. A proposed amendment to the OTC monograph procedure was published on 17 March 1999 but does not yet allow for the acceptance of foreign clinical data for ingredients commonly used in Europe but not in the US.

In addition, the problem of admission of European suntan lotions to the US market was first raised with the FDA in 1991. The FDA also received a petition by European cosmetic firms to open the simplified monograph procedure to UV-filters that had already been accepted in the EU. The FDA did approve sunscreen products containing avobenzone in concentrations of up to 3%. However, the final monograph covering this and other sunscreen products was published on 21 May 1999. Should the FDA follow the monograph’s conclusions, all of the characteristics of the label on a sunscreen product such as the size of the type, the size of the lines, the words used, would have to be followed.

A multilateral framework for co-operation on cosmetics was established between the EU, US, Canada, and Japan. A work programme on regulatory co-operation was established with a view to align review and approval procedures and examine equivalence of technical requirements. However, no progress has been made on the work programme for regulatory cooperation. FDA has been reluctant to consider in a serious way even simple harmonisation proposals put forward by the industry. For example, they have not acted on a petition submitted by the industry several years ago to allow the use of Colour Index numbers for ingredient labelling to identify colours contained in a product despite these numbers being used in the EU and in most of the countries around the world. The EU harmonised the majority of its labelling system with the US nomenclature system, the major difference being the colour identifications used. The FDA should act on the petition and develop a proposal for public comment.

### ***Textiles and Leather***

Extensive product description requirements complicate exports to the US. Particular rules for marking and labelling of retail packages to clarify the country of origin, indicate the ultimate purchaser in the US and state the name of the country in which the article was manufactured or produced are burdensome. Articles that are otherwise specifically exempted from individual marking are an exception to this rule. All textile fibres imported to the US have to be marked with the generic names and percentages by weight of the constituent fibres present in the textile fibre product in amounts of more than 5%. Any wool products containing woollen fibre, with the exception of carpets, rugs, mats, upholsteries and articles made more than 20 years prior to importation, have to be clearly marked so as to satisfy the requirements of the *Wool Products Labelling Act of 1939* (with regard to information on weight and importer). The *Fur Products Labelling Act* imposes similar obligations on fur products.

### ***Agriculture***

#### Wine Labelling

With respect to wine labelling, there exist procedures, both at Federal and in some cases at State level, for the approval of labels. Despite the thoroughness of the process, names and descriptive material that may pass off US wine as possessing characteristics or qualities of EU wine are approved. This risks undermining the reputation of the EU product and may displace potential sales.

#### US Standards on organic products

In February 2001, the US published a "final rule" establishing a National Organic Program (NOP) to be implemented over an 18-month period. While provision exists for imported products to be recognised as organic, the EU is concerned to avoid that impediments to trade are introduced by this new legislation, which will apply from 21 October 2002. Bilateral discussions have started with a view to ensuring that bilateral trade can continue and grow unimpeded.

## **5.6 Sanitary and Phytosanitary Measures**

The strict US Sanitary and Phytosanitary requirements, notably those related to inspection and approval procedures, have a significant impact on EU exports of agricultural products to the US market. Differences in US and EU standards do also have restrictive effects on trade.

### ***Restrictions on Imports of Meat and Other Animal Products***

Despite the adoption of the *EU-US Veterinary Equivalence Agreement*, in force on 1 August 1999, EU producers of meat and other animal products face numerous barriers of entry into the US market, notably restrictions related to disease-control that either do not have scientific basis or are taken without due regard to the principle of regionalisation, embedded in the *Veterinary Agreement* itself.

#### US restrictions related to control of animal disease

The US introduced rules in 1997 on the import of ruminant animals and products thereof from all European countries based on concerns about *Bovine Spongiform Encephalopathy* (BSE). These requirements are not scientifically based, do not follow the Organisation Internationale Epizootique (OIE) Code, and discriminate in targeting European countries. The US makes no distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases). The EU has raised its concerns at this excessive action bilaterally.

Quite apart from the BSE restrictions, the US also imposes animal health restrictions on the import of goats on the grounds of the risk of *scrapie in sheep*. These restrictions are not justified because of the widespread presence of scrapie in the US sheep population.

#### Non-recognition of the principle of regionalisation

The EU veterinary legislation, completed under the Single Market programme, provides for a policy of *regionalisation*. According to this policy, in case of the outbreak of an animal disease, restrictions are applied in the zones affected, with free movement of animals and products outside the affected zones. Only animals or products from non-affected zones can be considered fit for export under certain conditions.

The principle of regionalisation as an effective means of controlling animal disease, was incorporated into the US Tariff Act 1930 by the NAFTA and is part of the WTO SPS Agreement. However, US import administrative rules concerning Foot and Mouth Disease (FMD), Rinderpest and other relevant diseases were not amended to reflect this change in legislation, despite a clear commitment in the *EU-US Agreement on Application of the Third Country Meat Directive*, reached in 1992.

Finally, a provision on regionalisation was included in the EU-US Veterinary Agreement. However, the US has failed repeatedly to apply that provision, most recently in the case of FMD, where restrictions were imposed on the whole of the EU although the disease had occurred in four Member States only. Although US restrictions were finally lifted for all EU countries except the UK, the US did not follow the OIE rule to lift the ban in the affected EU Member States after a 90-day period of no outbreak of FMD.

The US published a proposed rule on the recognition of the disease status of certain member States for certain diseases on 14 November 1997 and confirmed it as a final rule in 1998. The US further committed itself in March 1998 to publish a further proposed rule covering the outstanding recognition of Member States and diseases, notably as regards *classical swine fever*. The Proposed Rule (published in the Federal Register on 25 June 1999), together with the additional written assurances, allowed the EU-US Veterinary Equivalency Agreement to be signed on 20 July 1999. The US published in May 2002 a favourable risk assessment study of the EU Member States as regards classical swine fever. By implementing this risk assessment, the US would implement the principle of regionalisation for this animal disease. By the end of 2002, a final rule on the basis of the 1997 proposed rule would allow import of pigs and pigmeat from most Member States, with the exception of France, Luxembourg and Spain. Because of procedural and administrative reasons, full implementation, involving all Member States, is only envisaged at the end of 2003. The EU regrets the slow procedure and the inconsistency of this approach. The US has indicated that the approach of the 2003 final rule could also be used for other animal diseases.

#### Non-comminglement requirements

"Non-comminglement" means that establishments exporting meat or meat products to the US may not handle meat or meat products from countries that are not recognised as being free from certain diseases of concern to the US, and that there is no mixing of meat or meat products destined for the US with meat or meat products from such countries. The EU-US Agreement on Application of the Third Country Meat Directive provides for an establishment to handle both categories of meat or meat products provided that there is a separation in time between handling them. So far, however, the US has not been willing to apply this provision of the agreement. The EU-US Veterinary Agreement includes also specific provisions for the application of non-comminglement.

#### Restrictions on imports of uncooked meat products

Imports into the US of uncooked meat products (sausage, ham and bacon) have been subject to a long-standing prohibition. Following repeated approaches by the EU, US import regulations were modified to permit the import of Parma ham, Serrano hams, Iberian hams,

Iberian pork shoulders and Iberian pork loins. However, the US still applies a prohibition on other types of uncooked meat products (e.g. San Daniele ham, German sausage, Ardennes ham) despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

***Approval of new non-manufactured agricultural products***

For new non-manufactured agricultural products, there are requirements for import permits to the US. The procedures between application and the inclusion in the list of approved products can take several years. This has been experienced even when other products from the same area of production with the same phytosanitary risks were permitted.

***Cumbersome inspection and approval procedures***

A variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters. The EU does not dispute the right of the US authorities to inspect imported goods but considers that adequate steps should be taken to deal expeditiously with perishable goods.

Some specific examples of difficulties encountered by EU exports due to the stringent inspection requirements imposed by US regulations are given below.

The import of *egg products* is conditioned to the performance of a continuous inspection of the production process. A system of periodic inspection would be acceptable from a human health point of view, but continuous inspection is superfluous and expensive, and has a negative effect on prices and competitiveness.

Finally, the import of “*Low Acid Canned Food*” such as fisheries products or dairy products is subject to a detailed prior approval system, which makes no provision for accepting such products produced under “equivalent” hygiene conditions.

***Restrictions on imports of citrus products***

EU exports of citrus fruit to the US market encounter particular difficulties.

Restrictions of ports of landing

One undue obstacle is the restriction, in the case of approved citrus consignments, of the ports of landing to those on the North Atlantic shores. This requirement leads to unnecessary costs of land transport into the southern and western parts of the US. If the products were pre-cleared in the Member State of production, and moreover subject to cold-treatment during transport, there is no phytosanitary justification for the port restriction.

Restrictions on imports of Spanish clementines

The most recent example of US unjustified phytosanitary measures on citrus consignments is the suspension by US authorities, from the last week of November 2001 and for an indefinite period of time, of the entry of clementines from Spain. US authorities argue that this action was taken because live Mediterranean fruit fly larvae had been found in Spanish clementines in four States. The EU disputes the reliability of the internal interceptions and the claim that the larvae were alive or viable. Estimated losses were €70 million for the 2001/2002 season.

The EU believes that this measure is unjustifiable, disproportionate, discriminatory and the most trade restrictive possible, and the Commission has repeatedly raised these concerns. A proposed final rule, which would allow trade to resume in October, was published on 11 July 2002 and subsequently notified to the WTO. The final date for comments was 9 September 2002 and it is hoped that the final rule, which was published on 21 October, will solve the problem. Estimated losses if trade is not possible in the 2002/2003 season are \$130 million.

### ***Restrictions on imports of plants and nursery stock***

The US allows for import of a very large number of plants originating in the EU, as well as growing media (except soil). However, when the allowed plants are planted in allowed growing medium, its import is subject to a specific rule (Q37 regulation), mainly based on a Pest Risk Assessment (PRA) to be performed by the USDA Animal Plant and Health Inspection Service (APHIS). The final procedure also needs clearance by the Fish and Wildlife Service.

Several EU producing Member States have expressed their interest in exporting plants in growing medium (for around 60 species) for the last 25 years or so. Only a very small number of assessments have been made so far. This extremely long delay is not acceptable. APHIS agrees, but regrets not to have the staff to speed it up. The same office has thousands of applications for approval from all over the world for flowers and fruits and vegetables for import and export. Export approvals have priority.

Some progress was however made on the assessment by APHIS of plants for the EU list, as for *Rhododendron* (cleared in 1998), more recently for *Schlumbergera* (Christmas cactus). However, the Fish and Wildlife Service has not yet given its final approval.

In addition, quarantine rules provided for a plant in growing medium once approved are very strict. Some of the mandatory requirements, like a two-year post-entry quarantine on the importer's premises, are considered by the EU to be excessive, or even not practicable for some of the species.

In July 2001, APHIS proposed to establish two working groups aiming at a more co-operative way of working on the issue. The first meeting (videoconference) took place on 13 September 2002, in order to set up the terms of reference of the working groups.

## **5.7 Government Procurement**

### ***Federal Buy America legislation***

The *Buy America Act* (BAA), initially enacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the opportunities for EU exports, but also discourage US bidders from using European products or services. The US industry, through the court system and legislative lobbying, ensures that Buy American preferences are enforced vigorously and maintained.

The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. The *Executive Order 10582 of 1954*, as amended, expands the scope of the BAA in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result of the GATT (subsequently WTO) *Government Procurement Agreement* (GPA), waivers from many Buy America provisions have been foreseen for GPA Parties (*inter alia*, through the 1979 Trade Agreements Act), including for the EU. However, the actual implementation of these waivers may in some cases produce legal uncertainty and this may act as a barrier. In addition, some Buy America provisions continue to significantly limit access to the US procurement market.

One of the most obvious areas of Buy America is federal aid administered by the Department of Transportation (DoT) under several different acts, including *the Highway Administration*

*Act*, the *Urban Mass Transit Act*, and the *Airports Improvements Act*. In accordance with these acts, the DoT provides aid to the State and local governments for various transportation-related procurements. The Federal government may fund 40% to 80% of the project (depending on the nature of the grant), while the State or local government must fund the remaining share. All purchases of goods and services related to these projects must meet various Buy America provisions, usually domestic content requirements of 60% and, failing that, a price penalty of up to 25%. In 2001, a Canadian steel supplier contested the compatibility of BAA provisions in Federal funded projects for transport and highways as contrary to the NAFTA. A final judgement of this case could be obtained in 2002 and would force a limitation of BAA laws.

The European Commission estimates Buy America to affect about US\$25 billion of contracts in FY2001, particularly mass transport and airport improvement. These are precisely the sectors where EU business is very competitive. This figure is expected to increase to about US\$35 billion by 2005, taking account of budget growth forecasts. These restrictions will negatively impact EU suppliers of products including iron and steel and transport equipment.

#### ***National security issues***

The Department of Defence (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the US government, spending many tens of billions of dollars annually on supplies and other requirements. Except as required by the *Defence Supplement to the Federal Acquisitions Regulation* (DFARS), contracting officers must apply BAA requirements to supply contracts exceeding the US\$2,500 micro-purchase ceiling and to service contracts that involve finishing of supplies when the supply portion exceeds the micro-purchase ceiling. In March 1999, the Director of Defence Procurement reminded US defence agencies and military departments to ensure that their contracting officers comply with requirements of the BAA, as an audit report had revealed that some contracts had been awarded to foreign firms in contravention of the relevant provisions.

Many procurements fall under “national security” exceptions to open procurement obligations. Although the concept of national security can be invoked under *Article XXIII of the GPA* to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led to a disproportionate reduction in the scope of DoD supplies covered by the GPA. While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the Agreement and which by national security exemptions. It has also expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. These intentions mark a first small step towards more acceptable practices.

#### **Berry Amendment**

The concept of “national security” was originally used in the *1941 Defence Appropriation Act* to restrict procurement by the DoD to US sourcing. Now known as the “*Berry Amendment*”, its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns -- for example, the 1992 General Accounting Office ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. A recent audit report by the Defence Department’s Office of Inspector General concluded that for certain DoD procurements during fiscal years 1996 and 1997, about half of the solicitations and contracts examined had not incorporated or enforced the relevant domestic sourcing requirements. In response, DoD’s procurement director has taken steps to ensure that contracts at or above the simplified acquisition threshold (presently US\$100,000) are domestically sourced. To comply with the Buy America provisions, contracting officers must generally add 50% to the price when evaluating offers with non-qualifying country end products against offers with domestic end products. In

September 1996 Congress adopted an amendment that extended the initial scope of the Berry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that EU fibres and yarns can no longer be used by US manufacturers for producing fabrics that they sell to the DoD.

Further DoD procurement restrictions are based on the *National Security Act of 1947* and the *Defence Production Act of 1950*, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US. At the same time, defence procurement from foreign companies is sometimes also impeded by Buy America restrictions on federally-funded programmes.

#### Memoranda of Understanding undermined

There has been a trend towards making DoD's other domestic preferences, apart from the BAA preferences, less restrictive – by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. In practice, all NATO countries (except Iceland), all major non-NATO allies of the US (e.g. Australia, New Zealand) as well as Sweden, Finland and Austria have signed MoUs with the US allowing for a waiver of the corresponding restrictions. However, these MoUs are subject to US laws and regulations, and consequently, other restrictions can be imposed annually by Congress through the appropriations process. For example, US legislation allows the Administration (DoD and USTR) to rescind a waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MoU by imposing *ad hoc* Buy America requirements during the annual budget process. In this respect, it is especially regrettable that Congress, after having adopted the Fastener Quality Act in 2000, continues to impose Buy America procurement restrictions on anchor and mooring chains. There are also indications that US procurement officers disregard the exemption of Buy America restrictions for MoU countries (e.g. fuel-cells, ball and roller bearings and steel forging items).

An amendment to the FY1998 Defence Appropriations bill, which would have given the Secretary of Defence blanket authority to waive the domestic preference for American speciality metals, stainless steel, flatware, clothing, or naval components, was substantially diluted by Congress. The compromise language only permits the Secretary of Defence to waive the restriction on a case by case basis under certain circumstances on a limited number of products, rendering the application of a waiver much more difficult. In addition, a bill introduced in the Senate (S.384) in February 1999 by the then-Commerce Committee Chairman McCain to authorise the Secretary of Defence to waive certain domestic source or content requirements in the procurement of items procured for the DoD failed to make any progress.

In fact, the barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing “domestic source restrictions” in US defence acquisition. A partial identification of all these barriers is provided in a July 1998 report of the US General Accounting Office that was established to justify these “domestic source restrictions”. The following examples illustrate the large variety of obstacles facing EU exporters to the US:

- Specific requirements to produce goods on US soil. This can take many forms, for example as part of the DoD programme approval procedure, a requirement exists that any major defence item must be produced on US soil, so that EU companies can only do business by selling the licences to manufacture (e.g. Harrier Vertical Take-Off and Landing Jet). In relation to large calibre cannons, there is legislation in Congress requiring that they be produced in a particular US plant. Such requirements can also be buried in the annual Defence Appropriations bill – for example, in relation to small arms, DoD is required to justify the need to buy offshore.
- There is no grant-back given for changes made to products by the licensee (a common element of licensing systems in the area of non-defence goods, as the original owner then benefits from changes made).



- Foreign comparative tests (FCT) are carried out to assess the best product for goods not produced in the US. Funds to carry out such tests were reduced in 1999, although the defence budget itself was increased. Also, experience shows that, where an FCT pinpoints a successful product, DoD seeks a licence to produce that product in the US rather than entering into a direct supply contract with the offshore producer. The effect of this practice is that EU suppliers look for a US production partner early in the process.
- Barriers arising from the use of the Foreign Military Sales Regulation (FMSR). The FMSR introduces maximum foreign content threshold requirements for products exported with FMS support. This means that US prime contractors willing to seek FMS support are reluctant to design foreign content into their products. Instead, they prefer replacing any foreign content by US production under licence (e.g. armoured vehicles were obtained under licence from Austria and then sold on to Kuwait through the FMS system – this took sales to third countries away from European companies).
- Technical data / Technology export control requirements. Non-nationals cannot take their own foreign companies' technical data out of the US (even if only showing around for sales purposes) unless the US company is granted a licence to export that data – and consequently rights over the data.
- US subsidiaries. One way of circumventing the US-soil production requirements is to set up a subsidiary in the US. However, such subsidiaries need to obtain both security clearance and authorisation to operate. A precondition for obtaining this is that the overseas parent company must relinquish management control of the subsidiary (US Security Manual). These “Chinese walls” are quite systematically established; examples are within Allison (now Rolls-Royce North America) and Tracor (part of BAE Systems).
- Lack of access to bidders conferences / security clearance considerations. Foreign nationals rarely have access to bidder conferences and other pre-contract award procedures, because they are not granted the required security clearances at that stage of the procurement process.
- Congressional approval of the defence budget. The defence budget is approved line-by-line and Congress regularly strikes out lines, including procurement programmes. The effect is that defence contractors lobby Members for support for individual programmes, offering inducements in return – sometimes ensuring that production capability will be located in Members' districts. This represents a kind of “regional juste retour” built into the budget approval process. As an example, the company developing a particular missile programme ensured that 49 States benefited from that particular programme, thereby ensuring that programme's survival in the budget.

#### Other restrictions based on national security

Management and operation of R&D facilities under the Department of Energy, NASA, the National Science Foundation, or the DoD are often entrusted to private companies and universities under “management and operating (M&O) contracts”. These contracts do not follow the open competition procedures required under the *Federal Acquisitions Regulations*. Very few M&O contracts have been subject to competitive procedures and often the procurements done by these companies themselves follow Buy America requirements. The US has excluded M&O contracts from its offer in the GPA. More widely, the government has instituted a number of R&D programmes in recent years in which there is a strong preference for US participants. Examples are the Renewable Energy Export Technology Transfer Program and the High Speed Ground Transportation Development Program. Most of these programmes also require BAA compliance with respect to all materials furnished pursuant to the project.

There are numerous other marginal expenditures. While not exhaustive, the following examples of Buy America statutory programmes should be mentioned: the Balance of Payments Program; the Merchant Marine Act of 1936; the Hazardous Materials Transportation Authorisation Act of

1994; the Amtrak Authorisation Act; Grants for Construction of Water Treatment Works; National and Community Service Act; National Science Foundation Act of 1988 (as amended); and the President's National Space Policy Directive of 1990 and 1994. The latter precluded US Government agencies from using foreign launch services (except, in the case of NASA, in collaborative projects not involving an exchange of funds). This policy was subject to undefined exceptions – a possibility that was never, or almost never, used.

The *Commercial Space Act of 1998* on the one hand, calls on Federal agencies to buy space launch services – rather than launch vehicles; on the other hand, it requires these services to be procured from “US commercial providers”, subject to certain exemptions and exceptions, for instance for international collaborative efforts related to science and technology. It thus legislates the Buy America policy contained until then in the President's National Space Policy but opens the door for NASA to enter into collaborative projects with foreign space agencies even if they involve the disbursement of funds. It remains to be seen whether US Government agencies will use that possibility and, more generally, how they will interpret the notion of “US commercial provider”. The US justified these restrictions, which initially applied to the launching of military satellites, on national security grounds, but they are now also applied to satellites for civilian use. These measures are part of a set of co-ordinated actions to strengthen the US launch industry and are clearly detrimental to European launch service providers. European launch operators remain in any case effectively barred from competing for most US government launch contracts, which account for approximately 50% of the US satellite market.

Finally, it must also be noted that, among the security measures adopted in the aftermath of 11 September, *Section 108 of the Aviation and Transportation Security Act*, passed in October 2001 requires any private security firm retained to provide airport security services be owned and controlled by a citizen of the US to the extent that the President determines that there are firms owned and controlled by such citizens.

#### ***Other indirect barriers***

Apart from direct legal barriers, the complexity of procurement rules can act as an effective indirect barrier. Suppliers based in countries that are parties of the GPA are generally not directly excluded from the scope of the BAA and other restrictive regulations. Instead, legislation generally foresees the granting of waivers as regards these suppliers. However, implementation of these waivers can produce a considerable degree of legal uncertainty.

#### ***Sub-federal selective purchasing laws***

At a sub-federal level, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies' business links with particular third countries) continue to cause great concern. Such laws have been adopted by the Commonwealth of Massachusetts (in the case of Myanmar) and more than 20 cities and local authorities, and are under consideration by a number of other sub-federal authorities. The Supreme Court found the Massachusetts legislation unconstitutional on the grounds of division of powers between States and the federal authorities. Whilst this removes this particular obstacle, the wider issue of principle vis-à-vis the EU is left unaddressed.

The State of New York proposed in summer 2001 an extension of its selective purchasing legislation based on the MacBride principles. The National Foreign Trade Council and the EU have already transmitted their concerns to the US authorities. Both believe that these measures are incompatible with the GPA (which covers New York entities) and appear to ignore the Supreme Court ruling in the Massachusetts/Myanmar case, at least in relation to the application of the Supremacy Clause. This proposal was dropped in September 2001.

The EU strongly objects to these attempts to regulate the behaviour of EU companies that are acting in full compliance with EU and Member States' laws.

The Commission will continue to monitor the situation in other sub-federal jurisdictions.

***State Buy America legislation and restrictions***

Buy America or “buy local” legislation is also rife at State level. More than half of all US States and a large number of localities do apply some “buy local” restrictions in one form or another. In some cases, the procurement of particular products is subject to such restrictions, such as steel, coal, printing and cars. Affirmative action schemes favouring small business or particular types of business (e.g. minority-owned) are also applied extensively in a large number of States. Although 39 of the 50 States are covered by the bilateral agreement of 1994 (and 90% of total procurement by value at State level), there are still gaps in its scope and, in some cases, concerns about its actual degree of implementation. Among the 11 States that have not been bound in the US GPA offer, some maintain very substantial local preferences, which have a negative impact on EU and other foreign suppliers. This is the case of Alaska, New Mexico, South Carolina and, to a lesser extent, Ohio and Virginia. In the case of New Jersey, State legislation also provides that for the construction of public works projects financed by State funds, the materials used (e.g. cement) must be of domestic origin. Even in the GPA-bound States various exemptions (i.e. for purchases of cars, coal, printing and steel and for set aside) seriously limit the procurement opportunities open to foreigners. Besides, all procurements by States and localities that benefit from particular types of federal funding (e.g. in mass transit and highway projects) are subject to BAA.

***Set-aside for small businesses***

The Federal government actively seeks to promote the growth of small businesses in numerous ways. It provides loans and grants, develops programmes to encourage bids from small business, and sets aside certain procurement contracts for small business. The “set-asides” are specifically exempted from application of the GPA. Small business set-asides account for tens of billions in expenditures or around 30% of all federal procurement dollars.

The relevant legislation is the *Small Business Act of 1953*, as amended, which requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US\$2,500 to US\$100,000) are set aside for US small or minority businesses -contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US that make a significant contribution to the domestic economy (through payment of taxes and/or use of US products, materials, and/or labour) and are not dominant. The standard size criterion for eligibility as a small business for goods-producing industries is 500 employees or fewer. However, for some industries (i.e. pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the employee limit is 750 and for some others (i.e. chemicals and allied products; tyres and inner tubes; flat glass; gypsum products; steel and steel products; computers, computer storage devices, terminals; motors and generators; telephone and telegraph apparatus) it is 1000. For services industries, depending on the sector, firms with total annual revenues of less than US\$2.5 million to 17 million are considered to be small businesses.

In 1999, the Small Business Administration launched another programme -HUBZone- that provides contracting benefits to small businesses located in “historically under-utilised business zones”. The first goal of the programme is to channel at least 1% of overall federal procurement to HUBZone small businesses, which at current federal spending levels equates to about \$2 billion. By the year 2003, that goal rises to 3% or about \$6 billion.

The notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under normal bid procedures, there is a 12% preference for small

businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the DoD, the standard 50% preference applies to all US businesses offering a US product.

An important number of States also operate particularly proactive small businesses and minority set-aside policies. It is estimated that in States like Texas such policies effectively exclude foreign firms from around 20% of procurement opportunities. In Kentucky, as much as 70% of procurement opportunities are set aside for small businesses. The active promotion of small businesses is a common concern for the EU and the US. The EU is, however, concerned that the US "set-aside" measures and their exemption from the GPA are favouring US industry and restricting the ability of foreign (EU and other) companies doing business in the US.

### ***Bearings***

Congress has imposed a Buy America requirement on the procurement of ball and roller bearings since 1988, most recently to the end of 2005. In May 1996, the Federation of European Bearings Manufacturers' Association (FEBMA) made a submission to DoD, in opposition to the restriction. The *1997 DoD Authorisation Act* contains the "*McCain Amendment*" authorising DoD to waive Buy America requirements that would impede the reciprocal procurement of defence items under the MOU. The EU and 21 NATO countries asked for the effective implementation of the McCain Amendment and the termination of discrimination vis-à-vis imports from countries with which DoD has signed defence co-operation agreements, thus supporting FEBMA's position. The DoD's implementing interim rule was published on 24 June 1997 and included bearings. However, the interim rule notes that acquisition of non-commercial ball and roller bearings is restricted to domestic sources by DoD Appropriations Acts. Each annual DoD Appropriations Act since 1997 has contained a similar restriction. Therefore, Buy America restrictions remain and the McCain Agreement waiver cannot be utilised fully for non-commercial ball and roller bearings.

### ***Iron, Steel and Non-Ferrous Metals***

The main problem for the steel sector is the imposition of local content requirements or the preference given in works and other government procurement contracts for bids that include locally produced steel. This practice is notably common at the sub-federal level. Many States (such as Connecticut, Louisiana, Maine, Michigan, Illinois, Maryland, New York, Pennsylvania, Rhode Island and West Virginia) have such requirements that also apply to private contractors and subcontractors.

As already mentioned above, West Virginia and Ohio have recently adopted legislation that introduces procurement restrictions on steel imports.

### ***Electrical and Electronic Equipment***

The conditions and procedures applied by many States, cities and utilities to procure electrical and electronic equipment favour local suppliers and local content. Admittedly suppliers and equipment from other parts of the US are also discriminated against, although to a lesser extent than foreign suppliers and equipment. At the federal level the Department of Defence, and to a lesser degree other departments, also handle procurement rules that discriminate against foreign supplies. All in all, public procurement of electrical and electronic equipment in the US does not abide by the principle of most favoured nation in respect to countries to which the US has granted that treatment.

### ***Telecom equipment***

As a result of the failure to liberalise purchases of telecom equipment, the US decided in 1993 to impose sanctions against the EU and certain Member States *under Title VII of the Omnibus Trade and Competitiveness Act of 1988*. The sanctions bar EU suppliers from bidding, *inter alia*, for US Federal government contracts that are below the threshold values of the GPA.

The EU responded with counter-sanctions (Regulation 1461/93) that also bar US bidders from applying for contracts awarded by central government agencies below the threshold values.

Following the bilateral Marrakech procurement agreement of April 1994, which liberalised around US\$ 100 billion of procurement opportunities on both sides, the EU considers that the sanctions are an unnecessary impediment to the bilateral relationship.

Following the liberalisation of the EU telecom sector and the new legislative regime on government procurement before the EP which will exclude the whole telecom sector from the scope of EC Directives on Government Procurement, the EC proposed to mutually remove the existing sanctions. The US Administration has started to investigate this possibility which may become effective upon adoption of the new Directives. Anticipating this positive solution, the European Commission has adopted in January 2002 a proposal for a Council Regulation repealing EC counter-sanctions (Regulation 1461/93). This Regulation will be adopted by the Council once the US lift their sanctions.

#### ***Central procuring agencies and e-procurement***

Public authorities have increasingly used central purchasing agencies open to the US Federal entities. Procuring entities are given a choice: either they follow the "traditional system", which requires publication of a notice in the Commerce Business Daily (CBD)-Net, or use the "new" electronic schedule system.

The EU is currently examining this system in order to verify its consistency with the GPA.

#### ***EU actions in the context of the GPA***

Many of the problems experienced by EU suppliers in accessing procurement opportunities in the US could be solved by an increase of the coverage of the GPA and by the elimination of the exceptions introduced in the US GPA offer. Apart from other initiatives, the EU considers that the current review of the GPA offers a good opportunity to improve the situation.

#### ***US Food Aid purchases***

Under US regulations, only US commodities may be used in food aid transactions. Legislation expressly includes opening up markets for US exports among its food aid objectives. The provision of such non-genuine food aid causes losses to commercial supplies of commodities. Several EU markets have been targeted by non-genuine US food campaigns.

## **5.8 Trade Defence Instruments**

In recent years, US trade defence measures have experienced a substantial increase, notably in relation to steel products. The abuse of trade defence instruments by US authorities with protectionist purposes has been repeatedly denounced, not only by the EU, but also by other WTO Members.

This has been reflected in the increasing number of cases brought to the WTO Dispute Settlement system in relation to US trade defence legislation and proceedings. Several aspects of US trade defence legislation and practices have already been condemned for their inconsistency with WTO Agreements (e.g. the 1916 US Antidumping Act, the methodology used by the US DoC in privatisation cases or the *de minimis* rates in sunset reviews).

The most recent and manifest example of the overtly protectionist use of trade defence instruments by the US Government is the imposition of safeguards measures for steel announced by President Bush on 5 March, which involves tariff increases of up to 30 percent.

#### ***US Safeguard measures***

On 5 March 2002, the US President proclaimed definitive safeguard measures in the form of an increase in duties ranging from 8 to 30% on imports of certain flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire, and in the form of a tariff rate quota on imports of slabs effective as of 20 March 2002.

Various country and product exemptions mean that these measures have a disproportionate effect on EU exports to the US.

Following inconclusive WTO consultations, the EC requested the establishment of a Panel in May 2002 and finally a single Panel was established against the US steel safeguards under Article 9.1 of the DSU following requests presented by Japan, Korea, China, Switzerland, New-Zealand and Brazil.

Similar claims are put forward by the complainants, notably: a violation of the requirement that safeguards are imposed as a result of serious injury caused by a "sudden, recent, sharp and significant" increase in imports; the attribution to imports of injury caused by other factors (including steel legacy costs); a breach of the proportionality principle; and the exclusion of imports from NAFTA partners from the remedy while those imports had been included in the injury investigation (lack of parallelism).

The EU has sought to minimise the impact on European firms by supporting requests for product exclusions, as well as seeking compensation as provided for under Article 8.1 of the WTO Safeguards Agreement. Although exclusions granted by the US have mitigated to a certain extent the effects of the safeguard measures on EU exports to the US, a large part of those exports are still suffering from the US measures.

On 13 June 2002, the EU adopted a Regulation (1031/2002) exercising its right to counterbalance the US measures in accordance with the relevant provisions of the WTO Safeguard Agreement. The Regulation contains a list of products for which suspension of concessions will automatically be applied five days after the adoption by the WTO DSB of a decision that the US measures are incompatible with the WTO Agreement, and another, shorter, list of products for which suspension of concessions could be applied at any time after 18 June 2002.

US legislation and practices related to the imposition of safeguard measures have already been challenged in the WTO Dispute Settlement system. All three WTO challenges to US *Section 201* safeguards- i.e. wheat gluten, lamb, and line pipe- and three challenges to US safeguards under the Agreement on Textiles and Clothing have been upheld.

On 1 March 2000, the US introduced two safeguard measures on imports of *steel wire rod* and imports of *welded line pipe*, under the form of a tariff increase above a tariff quota. The duration of the measures is three years and one day. The WTO consultations took place on 26 January 2001. The EC argued that both safeguard measures, as well as certain provisions of the US safeguard legislation, violated several substantive requirements of the WTO Safeguard Agreement and requested formal WTO consultations on 1 December. A panel was established at a special DSB meeting on 10 September 2001 on both safeguard measures.

Discussions continued after the establishment of the panel on a possible compromise on the wire rod measure in the context of the mid-term review. As a result of these discussions, President Bush issued on 21 November 2001 a proclamation modifying the allocation of the tariff rate quota on wire rod in a manner that accommodates EU's export interests.

It should be noted that, at the request of Korea, a WTO panel had already been established on these safeguard measures, which found in October 2001 that the US measure was inconsistent

with the WTO Agreements on several grounds. The Appellate Body has confirmed in a ruling of 15 February 2002 that the US measure is WTO-incompatible, in particular because it fails to allocate correctly the injury caused by the various factors and because it is not proportional to the injury caused by increased imports.

However, the illegal US safeguard on line pipe was not withdrawn yet and the US argued that a reasonable period of time was required for implementation of the Appellate Body report. On 29 April 2002, Korea requested an arbitration to determine this reasonable period of time. On 29 July 2002, Korea and the US notified to the WTO an agreement on the reasonable period of time, which was set to expire on 1 September 2002. At that date, special tariff rate quota shares were allocated to Korea. The US measures shall only be fully terminated on 1 March 2003.

### *US Antidumping Measures*

Different aspects of the US legislation and practice on antidumping investigations have also been challenged, notably the 1916 Antidumping Act, the so-called "Byrd Amendment" and the methodology used in sunset reviews.

#### 1916 Antidumping Act

The *1916 Antidumping Act* prohibits the import and sale of products "at a price substantially less than the actual market value in the principal markets of the country of their production." Following a Trade Barriers Regulation Procedure initiated in 1997, the Commission concluded that the 1916 Act was inconsistent in several aspects with US obligations under the WTO Agreement, the GATT 1994 and the WTO Anti-Dumping Agreement. Numerous attempts to solve the situation on a bilateral basis failed and so did WTO consultations. Consequently, a Panel was established in February 1999. In March 2000, the Panel report confirmed the 1916 Act's inconsistency with WTO rules, as it provides remedies to dumping, like the imposition of triple damages, fines and imprisonment, none of which are permitted by the WTO Agreement on Antidumping.

The US appealed this ruling, together with a ruling on a similar case brought by Japan. The Appellate Body confirmed the Panel's ruling and gave the US until 26 July 2001 to implement the decision. The US requested an extension to this deadline on 24 July and the EU, in order to facilitate US compliance with the DSB ruling and in light of the US commitments to terminate pending cases, agreed to extend the implementation period until 20 December 2001.

The US Administration sent a bill repealing the 1916 Act and terminating cases pending before US courts to Congress prior to the summer recess. However, it was only on the last day of the implementation period that the bill was formally introduced in the House of Representatives. Therefore, in order to safeguard its rights, the EC requested on 7 January 2002 the DSB's authorisation to suspend the application of the obligations under GATT 1994 and the Antidumping Agreement, more precisely to allow the EC to adopt an equivalent regulation to the 1916 Act against imports from the US. This mirror regulation would allow the EU to impose on US companies found to dump their products in Europe additional duties corresponding, over the five-year projected life of the measures, to three times the amount of the damage suffered by companies in the EU. The investigation would be conducted by the EU as part of the anti-dumping investigation and the additional duties would be paid to the EU budget (and not to the complainants). Japan, which is co-complainant in this case, has submitted a request for suspension of obligations similar to the EU one.

The US requested arbitration under Article 22.6 DSU against these requests at the special DSB meeting on 18 January 2002. The two parties agreed that arbitration would be suspended until 30 June 2002 so as to facilitate adoption of the necessary legislation by Congress. Since that date expired, either party can resume the proceedings.

On 23 April 2002, another bill was introduced in the Senate that would repeal the 1916 Act and apply to all pending court cases. As yet, Congress has not adopted any of the bills (see Section 9 below).

There are currently three active cases pending in US Courts based on the 1916 Act. On 7 March 2000, a US printing press manufacturer filed a complaint under the 1916 Act against German (and Japanese) producers of large newspaper printing presses in the US District Court for the Northern District of Iowa. This case, suspended for two years, resumed on 8 August 2002, since legislation repealing the 1916 Act had not been adopted by that date. After the 1916 Act was declared WTO incompatible, two other cases were filed against EU companies, one in the District Court for the Southern District of Ohio and another in the US District Court for the Western District of Wisconsin. Despite the clear condemnation of the 1916 Act, these companies are now facing substantial litigation costs.

#### Byrd Amendment

The *Continued Dumping and Subsidy Offset Act* (so-called "Byrd amendment"), signed into law in October 2000, provides that proceeds from anti-dumping and countervailing duties shall be paid to the US companies responsible for bringing the cases. This provision is clearly incompatible with several WTO provisions.

On 22 December 2000, the EC, together with eight other WTO partners (Australia, Brazil, Chile, India, Indonesia, Japan, Korea, and Thailand), requested formal WTO consultations with the US. This joint action is a clear indication of the important systemic concerns that the legislation raises among WTO members.

Consultations with the US were held on 6 February 2001 but did not lead to any result since the US representative indicated that the Administration would take no steps to convince the Congress to revoke the law. On the contrary, the granting of the subsidies would start as from the new fiscal year.

Upon joint request from the nine co-complainants, a single Panel was established by the DSB on 23 August 2001. Canada and Mexico joined the Panel proceeding at a later stage. On 16 September 2002, the Panel circulated its report, upholding the core of the complainants' claims. The Panel confirmed that the Act was an impermissible response to dumping and subsidy and rendered meaningless the WTO provisions requiring Members to test the domestic industry's support for application before initiating an investigation, by making such support a condition to get access to funds. As a result of the WTO inconsistency of the Act itself, the Panel took the unusual step to recommend the repeal of the Act.

In the meantime, the US authorities have started to distribute to domestic petitioners more than US\$ 200 million in anti-dumping and countervailing duties collected under the Act and are planning to make a new distribution in November 2002.

#### ***US sunset reviews of Antidumping and Countervailing measures***

In a case on *corrosion resistant steel from Germany*, the DoC recommended continuation of antidumping and countervailing duty measures, in spite of the amounts of dumping and subsidy being below the current "de minimis" levels.

After unsuccessful WTO consultations, the EC requested a WTO Panel, which was finally established on 10 September 2001. On 3 July 2002, the Panel circulated its report, which upholds EC claims. The Panel has found that, if the subsidy rate likely to prevail in the sunset review is below the 1% *de minimis* required to impose measures in new investigations, the CVD should be terminated.



On 25 July 2002, the EC has once more requested consultations in relation to US legislation on sunset reviews and, in particular, the result of specific sunset reviews of antidumping and countervailing duty measures imposed in 1993 on *cut-to-length steel plate from Germany and corrosion-resistant steel from France and Germany*. The main EC claims relate to treatment of non-co-operation of the exporters, the definition of the *de minimis* dumping margin, the standards for assessing cumulatively the imports in the injury analysis and the treatment of negligible import volumes in sunset reviews. Japan, whose exports of corrosion-resistant steel were subject to the same sunset review, has already initiated dispute settlement on the US decision. The Panel was established on 22 May 2002 and the EC is third party to this proceeding.

### ***US Countervailing Duty Measures***

Still with regard to sunset reviews, the EU also challenged the methodology used by the US to apply countervailing duty legislation to privatised companies.

In June 1998, the EC initiated a WTO dispute settlement procedure against the DoC countervailing methodology with respect to privatisation of the EU company British Steel. The Commission held that the US practice of countervailing pre-privatisation subsidies without showing whether the privatised company has obtained a benefit constitutes a violation of the Agreement on Subsidies and Countervailing Measures (ASCM). The Panel finally established to examine the issue found, on 23 December 1999, in favour of the EC and condemned the US methodology. The WTO Appellate Body confirmed these findings on 10 May 2000.

The US has taken the view that the ruling only applies to the British Steel case, and has no impact on the 14 other DoC measures against privatised EU firms (almost all in the steel sector). The change of ownership methodology has also come under some domestic pressure, following the loss of the *Delverde* case in the US Federal Court of Appeals.

On 13 November 2000, the EC requested consultations with the US under the DSU on the 14 outstanding cases. While the US admitted that the methodology used in the British Steel case violated WTO rules, it replaced it with a methodology that appears to be equally contrary to WTO rules and produces even worst results for the exporting companies.

In these circumstances, the EC requested consultations also on the new methodology and a last attempt was made with the new US Administration in order to find an acceptable solution without having to resort to WTO panels, with no avail. On 18 July 2001, the US DoC confirmed that it refused to accept the compromise proposals made by the EU.

Therefore no alternative was left but to pursue the matter before the WTO. The request for the establishment of these Panels was presented for the first time at a special DSB meeting held on 23 August 2001. Despite a commitment not to do so, the US opposed the establishment of the Panels.

The Panel was established at a special DSB meeting on 10 September 2001. The EC has won this case as well. The Panel report circulated on 31 July 2002 has indicated that the WTO incompatibility of the US methodologies was due to the fact that the US failed to determine whether the new privatised producer received any benefit from prior financial contributions to state-owned producers.

## 5.9 Export Restrictions

### *Export controls*

A comprehensive system of export controls for dual-use items was established under the *Export Administration Act* (EAA) of 1979 and the US Export Administration Regulations (EAR) to prevent trade to unauthorised destinations. This system, among other things, requires companies incorporated and operating in the EU to comply with US re-export controls, including compliance with US prohibitions on re-exports for reasons of national security and foreign policy. The extraterritorial nature of these controls has repeatedly been criticised by the EU, given the fact it consists of active members of all international export control regimes: the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement (see Iran Non-Proliferation Act, chapter 3).

Serious concerns have also been raised by the *1988 US Trade Act's amendment to Section II* of the EAA providing for sanctions against foreign companies which have violated their own countries' national export controls, if such violations are determined by the President to have had a detrimental effect on US national security. The possible sanctions, which would consist of a prohibition of contracting or procurement by US entities and the banning of imports of all products manufactured by the foreign violator, would appear to be contrary to the GPA.

### *Satellites*

Since 1999, the jurisdiction for export controls on commercial communications satellites as well as parts and components and related technical data has been transferred by Congress (*National Defence Authorisation Act*) from the Commerce Department to the State Department. Goods or technologies previously listed as dual-use goods have been added to the US munitions list, thus subjecting them to tighter controls. Exceptions were provided by Congress calling for an expeditious treatment of export licence requests for NATO and major non-NATO allies. However in practice this exception had no effect, with the US Administration retaining wide latitude for imposing additional export control requirements, also on NATO countries, as it sees fit for reasons of national security. These additional controls, including monitoring of technical exchanges with EU firms, have led to delays and uncertainties in the licensing process, causing concerns about possible delays in satellite launches and impairment of EU launch providers' ability to serve the US commercial market (US Government launches are reserved for American providers according to *the Commercial Space Act* adopted in 1998- see Section 5.7 on "Government Procurement"). They also impact negatively on manufacturers of satellites and components which rely on US parts, impair the ability of EU firms to reply to US bids for tender, and affect European insurers of launches of US satellites whose access to the technical data required to assess the insurance risks has been hampered.

A provision in the *FY2000 Consolidated Appropriations bill* signed into law in November 1999 attempted to clarify the so-called "*NATO/non-NATO major allies exception*." Pursuant to this provision, a new regulatory regime for export licenses to US allies was established in May 2000, primarily for satellite components, parts, accessories and technical data, and entered into effect in July 2000. A separate regime was set up for commercial communication satellites involving US allies, including those exported to French Guinea for launch. Then-Secretary of State Albright gave assurances in a May 2000 letter to Members of Congress that the licensing process would be expedited. However, industry continues to express concerns that this regime does not adequately address the difficulties caused by the transfer of jurisdiction. Two bills are pending before Congress, one which will reform the regime controlling exports of dual-use items and technologies, including space-related ones, and military items, and a second which will return the licensing process for satellites to the DoC.

### ***Encryption***

An interim final rule was published on 14 January 2000, which amends the Export Administration Regulations (EAR) to allow the export and re-export of any encryption commodity or software to individuals, commercial firms and other non-governmental end users in all destinations. It also allows exports and re-exports of retail encryption commodities to end users in all destinations; post export reporting requirements are streamlined and the changes of the Wassenaar Arrangements are incorporated (Cryptography Note). The restrictions on terrorist supporting states (Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria), their nationals and other sanctioned entities are not affected by this rule. This new rule could pose potential problems such as a different treatment for use by government bodies, Internet and telecommunications service providers for which existing or new restrictions apply. The notion of "US subsidiaries" in Section 740.17 could create a competitive disadvantage for European firms based in the US (especially for the development of new products), as they will have their products "technically reviewed". Furthermore, a "supplementary information" provision is required for foreign companies to apply for Encryption Licensing Arrangements (ELAs) in order to obtain treatment equivalent to that extended to foreign subsidiaries of US parent companies. The generalised introduction of the technical review of encryption products above a certain key length in advance of sale creates a difficulty for the European industry for cases of re-export. The newly created rules applicable to retail encryption commodities and software, in particular the eligibility criteria (functionality, sales volume, distribution methods, ability to modify products and the level of support by the supplier), will probably be subject to divergent interpretations. The effect of the Cryptography Note, as introduced in the Wassenaar Arrangement, is reduced by the US authorities through the introduction of two new requirements: "crypto functionality should not be modified or customised" and "the items cannot be network infrastructure products such as high end routers or switches designed for large volume communications". The latter items still need to be licensed.

The practical effects of this remain to be seen. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but also, more importantly, the effective growth of e-commerce. Moreover, many modern encryption techniques are patented and licenses may be required to allow sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

## **5.10 Subsidies**

Both US Federal and State authorities continue to provide significant direct and indirect support to US industry, by means of direct subsidies, protective legislation or tax policies. In this respect, *Foreign Sales Corporations* (FSC) legislation remains a matter of major concern, as the US has failed so far to implement the Appellate Body's report of 14 January 2002, which confirmed that the FSC replacement, the *FSC Repeal and Extraterritorial Income Exclusion Act* (ETI), is still an export subsidy inconsistent with the ASCM and the WTO Agreement on Agriculture.

In addition, the adoption by Congress of the *Farm Security and Rural Investment Act of 2002* (2002 Farm Act), whose application will significantly increase the trade distortion effect of US farm subsidies, is of particular concern to the EU, especially due to its evident inconsistency with commitments undertaken in the context of WTO negotiations.

### ***Notification of US subsidies to the WTO***

Transparency in the area of subsidies is an obligation of the ASCM. Up to 1998, the US only notified the WTO of a limited number of Federal programmes, many of which were relatively small, and refused to notify its many State-level subsidies. However, following pressure from

the EU, in the form of detailed questions and a counter-notification under Article 25.10 of the ASCM, the US finally began to notify certain State-level subsidies in its new and full notification of 1998.

This notification was reviewed in the WTO Subsidies Committee in May 1999. The EU still remained concerned by the lack of information on US State-level subsidies, particularly large, *ad hoc* investment incentives. The reporting of Federal subsidies was improved, although there were still gaps as regards certain sectors, notably aerospace. The US undertook to include non-notified subsidies, including those identified by the EU, in the next update notification. This should have been provided in 1999. However, no update was provided until the Subsidies Committee on 2 July 2002, where the US provided an update on subsidies for 1999 and 2000 and a new and full notification for 2001.

### ***Foreign Sales Corporations***

US legislation authorising so-called Foreign Sales Corporations (FSCs) (26 USC Sections 921-27) provided that, under specific conditions, certain income earned by a foreign subsidiary of a US corporation will not be subject to US tax. The statute's presumption as to income allocation was questionable and gave rise to an objectionable tax benefit accruing to US firms. The purpose of the favourable tax treatment had been to encourage the export of US manufactured goods. The FSC is general legislation, applicable to all industrial and agricultural sectors, and was recently expanded to cover the software and military sectors.

Subsidies that are contingent upon export performance or upon the use of domestic over imported goods, are strictly prohibited under the WTO. The FSC scheme applies exclusively to the export of goods and these goods must have more than 50% of their market value of US origin. Therefore, the FSC scheme provides a prohibited subsidy within the meaning of Article 3 of the ASCM and Article 1 of the Agreement on Agriculture.

Contrary to US claims, FSC tax exemptions cannot be justified by the aim to avoid double-taxation for US companies established abroad, as FSCs are typically established in tax havens where no income tax is paid at all. For instance, in 1996, 91% of all FSCs were incorporated in the US Virgin Islands, Guam and Barbados.

On 24 February 2000, the WTO Appellate Body confirmed the ruling of a Panel that ruled in favour of the EC, as it considered that FSC exemptions amount to a prohibited export subsidy under the ASCM as well as the Agreement on Agriculture. The WTO gave the US until 1 October 2000 to comply with the ruling. On 29 September 2000, the EU and the US concluded a procedural agreement by virtue of which the EC would not impose suspension of concessions on the US until the WTO-incompatibility of the FSC replacement legislation would be determined in a compliance procedure.

On 15 November 2000, the *FSC Repeal and Extraterritorial Income Exclusion Act* (ETI) came into effect. This Act still provides US firms with prohibited export subsidies and so does not comply with the Panel's rulings. On 17 November, the EC presented both the request for suspension of concessions under Article 22 DSU and the request for consultations under Article 21.5 DSU, which is the first step in the compliance procedure. The report of the 21.5 compliance Panel, circulated on 20 August 2001, confirmed that the ETI is in breach of the US WTO obligations. This Panel ruling was upheld by the Appellate Body in its ruling circulated on 14 January 2002.

The adoption of the Panel and Appellate Body reports by the DSB on 29 January 2002 triggered the automatic resumption of the arbitration procedure concerning the level of the countermeasures. The list of products presented to the WTO was at 2-digit level (chapters of the Common Custom Tariff) for an amount of \$4 billion. In July 2002, the Chairman of the House & Means Committee (Rep. Thomas) introduced legislation designed to repeal the ETI (HR 5095, The American Competitiveness and Corporate Accountability Act). While President Bush has pledged the US will comply with the WTO ruling, so far Congress has not

passed WTO-compliant legislation. On 30 August 2002, the WTO arbitrators agreed with the EC and awarded the full amount (US\$4,043 billion) of potential countermeasures that could be applied if the US does not repeal the ETI scheme.

An illustrative example of the economic impact of the challenged US legislation described is the benefits received from this tax scheme by Boeing. Boeing declared in its 2001 financial statements that FSC tax benefits amounted to US\$222 million. This accounted for about 8% of Boeing's net earnings for the same year (US\$2.8 billion). Between 1995 and 2001, FSC benefits for Boeing amounted to US\$1 to 2 billion. In terms of market value, it has been estimated that improved earnings due to FSC subsidies translate into advantages of US\$1 to 2 billion for Boeing's market capitalisation, allowing it recourse to relatively cheaper capital. The FSC system therefore grants a considerable competitive advantage to US manufacturers to the detriment of their competitors.

### *Agriculture and Fisheries*

#### US Agricultural Export Subsidies and Export Promotion

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. The US has continued to maintain an aggressive export policy for agricultural products.

The *Export Enhancement Program* (EEP) allows US exporters to apply for a cash subsidy designed to make US products competitive with exports from other countries. The *Dairy Export Incentive Program* (DEIP) is also used for dairy market development purposes. The *Market Access Program* (formerly the Market Promotion Program) offers a share of costs for promotion campaigns for agricultural products (the majority being high value and value added) in selected export markets. The budget provided US\$ 90 million annually for fiscal years 1996-2002, and is increased to \$200 million under the 2002 Farm Act.

The *Export Credit Guarantee Program* offers US government guarantees of short-term GSM-102 (up to 3 years) and medium-term GSM-103 (up to 10 years) private bank loans at commercial interest rates. It is targeted at countries that need guarantees to secure financing but show a reasonable ability to repay. The program includes a specific list of commodities per country allocation. It has recently become the main export policy tool of the USDA, with annual allocations exceeding \$5 billion and declared annual subsidy levels of over \$400 million. The program has a default rate of over 10% historically, and it is characterised by uncertainty (and lack of transparency) with respect to the implicit subsidy component stemming from rescheduling of payments. In addition, the *Emerging Markets Program*, which targets emerging markets with growth potential for US agricultural exports, is funded at \$1 billion annually.

To date no agreement has been reached on rules governing export credit guarantees in agriculture, in contravention of what is required under Article 10.2 of the WTO Agreement on Agriculture. Negotiations were due to commence in the OECD in 1995, but were held up by US objections for 4 years. The OECD, in its 2000 report on export credits, found that 88% of trade distortions arising from export credits in the agricultural sector came from the US.

In December 2001, the US extended a further export credit programme, the short-term *Supplier Credit Guarantee Programme* (up to 360 days), to exports to the EU. This programme has a budget of \$50 million.

State-level export promotions often remain concealed and unnotified to the WTO. In 2001, Washington State paid an export subsidy to foreign purchasers of apples. This was contrary to US WTO undertakings. Following representations by the EU, the USTR agreed to discontinue the measure and committed not to launch similar programmes in the future.

Finally, the propensity of the US to use food aid to countries not suffering food shortages as a means of disposal of surplus farm products has the effect to disturb local markets, cut out

traditional supplies and undermine local producers. Following EU complaints, the US has partially reviewed its policy. However, the 2002 Farm Act has reinforced the role of US food aid as an export enhancement tool.

### 2002 US Farm Act

Agriculture policy was overhauled in 2002 with the passing of the *Farm Security and Rural Investment Act of 2002* (2002 Farm Act). Despite a consensus among WTO Member States that farm policies should be reformed in the direction of less trade-distorting forms of support, the 2002 Farm Act goes in the opposite direction and increases the distortionary effect of US farm subsidies. The main elements of the new legislation are:

- increase of 80% in spending on commodity subsidies above the levels foreseen under the pre-existing policy (totalling \$15-20 million per year, depending on market prices);
- introduction of new 'counter-cyclical' payments for arable crops, designed to compensate for falls in market prices. These payments, together with the continued 'loan programme', shield farmers from low prices and thus perpetuate a cycle of over-production and downward pressure on prices;
- updating of 'base areas' on hitherto 'fixed' arable crop payments, thus re-linking these subsidies to current production;
- payment of a new 'counter-cyclical' subsidy to dairy farmers to counteract price movements;
- introduction of a 'promotional levy' on dairy imports, which could be applied in a manner to act as a tariff increase (see also section 4.1 on “Applied Tariff Barriers”);
- new subsidies for producers of fruit and vegetables, wool, mohair, honey, and for grassland livestock farmers;
- substantial increases in export assistance measures, including a 120% increase in the Market Access Promotion programme to \$200 million per year, and non-emergency 'food aid' programmes explicitly designed to expand US export opportunities and dispose of surplus production;
- subsidies for energy producers who utilise agricultural commodities, such as maize and soya.

The new farm policy has been widely condemned, both within and outside the US. The main reasons for criticism are (a) the potential for the crop subsidies to depress world prices; (b) the probability that the US will exceed its WTO limit of \$19.1 billion production-linked support (the 'AMS limit'); and (c) the failure of the US to play its part in the consensus among WTO members for continued and progressive reduction in trade-distorting farm support measures. The EU will monitor the implementation of the 2002 Farm Act for compliance with trade rules, and as necessary, defend its rights.

### ***Aircraft and Aero-engines***

As far as civil aircraft are concerned, two agreements are predominant: the 1979 *GATT Agreement on Trade in Civil Aircraft*, and the 1992 *EU-US Agreement on Trade in Large Civil Aircraft (Bilateral agreement)*. This latter agreement regulates precisely the forms and level of government support for both sides, provides for transparency and commits the parties to avoiding trade disputes. It focuses on the limitation of *both* direct (launch investment) and indirect (in the form of R&D benefits) government support.

Although balanced on paper, the Bilateral Agreement suffers in practice from a divergence of interpretation on the indirect support discipline. This has created a *de facto* increasing imbalance of obligations. Despite multi-billions of dollars in public funding for NASA and DoD aeronautics R&D budgets, the US has so far hardly admitted *any* benefit to its large civil aircraft industry.

According to estimates carried out for the EU, these benefits to the civil aircraft manufacturers amounted in 2000 up to US\$2 billion. This includes Boeing benefits from prohibited export subsidy (FSC) of \$291 million (\$222m in 2001). This represents 7.1% of Boeing's turnover, whereas the limit established by the Bilateral Agreement is 3%.

The EU has also expressed its concern over legislation allowing 100 tankers aircraft to be ordered by the US Air Force (USAF) from Boeing without allowing real competition from Airbus, which can result in procurement at a price substantially above the market value of the aircraft (notwithstanding the costs of conversion into a tanker- to be borne by the USAF).

The EU also remains concerned by the AIR-21 FAA re-authorisation legislation, which granted the Secretary of Transportation discretionary authority not to grant landing & take-off rights ("slots") at four US airports for airlines which did not fly Boeing [the authority has recently expired for one of those four airports]. This constitutes discrimination violating three international agreements (the EU-US 1992 Bilateral Agreement, the 1979 GATT Agreement on Civil Aircraft and the GATT).

The EU is also concerned by US Government financial contributions granted to US engine manufacturers in the form of benefits from R&D funded by NASA, the DoD - dual use technology - and other mechanisms such as prohibited export subsidies (FSC). GE and Pratt & Whitney are the dominant beneficiaries. These subsidies, which are non-repayable and can be directly traced to specific engine programmes, average \$1.2 billion annually.

#### ***State Aid for US Airlines***

Whilst recognising the severe financial consequences of the events of 11 September on US airlines and the need to ensure that vital transport services in the US were maintained, there are concerns about the scale of financial assistance provided by the US Government to US air carriers (see Section 8.4. below).

#### ***Shipbuilding***

The signing of the *OECD Shipbuilding Agreement* in December 1994, which was negotiated upon a request of the US and was meant to eliminate aids in the shipbuilding sector, was a major achievement and was expected to have a significant impact on US and all other signatories subsidy programmes and unfair practices in the shipbuilding sector. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices.

Standstill provisions on existing subsidy levels and on new measures of support before the entry into force of the Agreement had been accepted within the Final Act of the Agreement.

In December 1995 the EU, South Korea and Norway (and in June 1996 Japan), deposited their instruments of ratification for the Agreement and Japan in June 1996. The failure of the US to ratify it remains a matter of great concern. Opposition in Congress originating from the naval industry did not allow the US to ratify it and, despite several attempts during the past years, no bill concerning the implementing legislation has moved in Congress. The EU continues to monitor the impact of the existing subsidy programmes and to request the ratification of the OECD Agreement by the US. To date, ratification has not taken place and while US industry's concerns about unfair competition by Korean yards could relaunch the process in the future, this is now less likely in the light of an anticipated increase in military shipbuilding

In this respect, it should be noted that at its 101<sup>st</sup> session on 25-26 of April 2002, the OECD Council Working Party on Shipbuilding agreed to commence immediate action to bring about normal competitive conditions in the world shipbuilding industry. The Working Party decided *ad referendum* that the best way of progressing would be through a new Shipbuilding Agreement to be completed as soon as possible. The negotiation of a new Agreement would review and address market distorting factors, in particular government support measures,

pricing practices and other practices which distort normal competitive conditions in the world shipbuilding market, as well as mechanisms to deal with these.

From 1980 until 1994 US shipbuilders were not competitive enough to build merchant ships for export. The domestic market for the US Navy and the protective *Merchant Marine Act of 1920* (so-called *Jones Act*), which reserves the construction of the vessels used for coastwise traffic to US shipbuilders, provides shipyards with orders. Production was less than 100,000 gross tonnes (gt) in 1993 while the available capacity was 250,000 gt. During the period 1994-1998, the deliveries grew to 641,000 gt but have, in the meantime, dropped again due to a high dollar exchange rate and an increasing loss of competitiveness in US shipbuilding (the price of US-built merchant ships is typically 3 to 4 times the world market price). The shipbuilding industry now represents less than 1% of the world market and the potential capacity, taking into account re-conversion of military installations, is estimated at 1.1 million gt. The Jones Act, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic-built requirements. These are provided via the *Operating Differential Subsidy* (ODS), the *Capital Construction Fund* (CCF) and the *Construction Reserve Fund* (CRF). These measures would have had to be modified by the US Congress before the entry into force of the Shipbuilding Agreement.

In addition the US Administration introduced a programme, the *Capability Preservation Agreement Scheme*, which was signed into law on 18 November 1997 (PL 105-85). This scheme allows qualified shipyards to claim for reimbursement on their US Navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

The Jones Act also established under its Title XI, the *Guaranteed Loan Program* (formerly known as the Federal Ship Financing Guarantee Program) to assist in the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the US. In 1993, the guarantee programme was extended to cover vessels for export. During FY2000, the Maritime Administration (MARAD) approved US\$886 million worth of Title XI guaranteed loan applications for 15 vessels and barges and 2 cruise ships. As of July 2001, for FY2001 MARAD has approved US\$536 million in loan guarantees. Since fiscal year 1994, the Title XI programme has guaranteed loans for at least 426 vessels covering US\$5.75 billion in loans. The OECD implementing legislation would have had to provide for the amendment of these loan guarantees in order to put them in conformity with the rules of the 1994 Understanding on export credits for ships, which would have entered into force together with the OECD agreement. The US industry would like to retain this scheme that has helped to revitalise the sector. In the meantime, a new *Sector Understanding on Export Credits for Ships* took effect on 15 April 2002 as an Annex to the Arrangement on Guidelines for Officially Supported Export Credits. It is expected that this will contribute to the establishment of normal competitive conditions in this market.



## 6 INVESTMENT RELATED MEASURES

### 6.1 Direct Foreign Investment Limitations

The EU continues to be concerned about the current significant restrictions to foreign investment, especially the ambiguous provisions of the *Exon-Florio amendment*, the imposition of conditional national treatment by many US laws, and the remaining restrictions in sectors such as shipping and communications.

#### *National security considerations: Exon-Florio provisions*

Section 5021 of the 1988 Trade Act, the so-called *Exon-Florio Amendment to the Defence Production Act*, authorises the President to investigate the effects on US national security of any merger, acquisition or take-over that could result in foreign control of legal persons engaged in interstate commerce. This screening is carried out by the Department of Treasury-chaired Committee on Foreign Investment in the US (CFIUS). The length of time taken by the screening process and the legal costs involved can act as a deterrent to foreign investment. Moreover, should the President decide that any such transactions threaten national security – which is widely interpreted -- he can take action to suspend or prohibit these transactions. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment. Since this legislation was introduced, the scope of Exon-Florio has been further enlarged.

Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over that gives it control of the company. Further provisions contain a declaration of policy aimed at discouraging acquisitions by and the award of certain contracts to such entities.

The 1993 *Defence Authorisation Act* requires a report by the President to Congress on the results of each CFIUS investigation and includes, among other factors to be considered, “the potential effect of the proposed or pending transaction on US international technological leadership in areas affecting US national security”, again blurring the line between industrial and national security policy.

The Exon-Florio provisions thus inhibit the efforts of OECD members to improve the free flow of foreign investment and could conflict with the principles of the *OECD Code of Liberalisation of Capital Movements* and the *National Treatment Instruments*, although the US has notified reservations under these instruments for Exon-Florio.

While the EU understands the wish of the US to take all necessary steps to safeguard its national security, there is continued concern that the scope of application may be carried beyond what is necessary. In this context, the EU has drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. Although the US Treasury’s implementing regulations, which were published in November 1991, did provide some additional guidance on certain issues, many uncertainties remain. Coupled with the fear of potential forced divestiture, many if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect a very significant number of EU firms’ acquisitions in the US are subject to pre-screening.

### ***Foreign ownership restrictions***

With regard to foreign ownership, the US has informed the OECD of a number of additional restrictions that it justifies “partly or wholly” on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the *Jones Act* and the *US Outer Continental Shelf Lands Act*, which includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf. Foreign investors must form a US subsidiary for exploitation of deep-water ports and for fishing in the US Exclusive Economic Zone (*Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987*). Under the *American Fisheries Act of 1998*, fishing vessel-owning entities must be at least 75% owned and controlled by US citizens in order to document a vessel with a fishery endorsement. Licences for cable landings are only granted to applicants in partnership with US entities (*Submarine Cable Landing Licence Act of 1921*).

Under the *Federal Power Act*, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the Federal government has control, are to be licensed by the Federal Energy Regulatory Commission. Such licenses can be granted only to US citizens and to corporations organised under US law. The same applies under the *Geothermal Steam Act* to leases for the development of geothermal steam and associated resources on lands administered by the Secretary of the Interior or the Department of Agriculture. Regarding the operation, transfer, receipt, manufacture, production, acquisition and import or export of facilities which produce or use nuclear materials, the *Nuclear Energy Act* requires that a licence be issued but the licence cannot be granted to a foreign individual or a foreign-controlled corporation, even if there is incorporation under US law.

Significant limitations to foreign investment also remain in the US communications market (see Section 8.2 below) and the air transport market (see Section 8.4. below).

### ***Conditional national treatment***

The principle of National Treatment (according to which foreign direct investment should not be treated less favourably than domestic enterprises in like circumstances) is one of the pillars of the liberalisation in the world economy and a well-established legal standard in bilateral treaties and multilateral agreements. In OECD Member States, as well as world wide, there has been a trend to remove barriers to the entry of foreign investment and to extend the application of national treatment by gradually removing existing restrictions. However, in the US, as in other countries, some long-established exceptions to this principle still exist, thus giving rise to instances of Conditional National Treatment (CNT).

CNT generally relates to the treatment of foreign-owned firms that is less favourable than that of domestic firms. The conditioning of investment may take the form of:

#### ***Reciprocity***

The investment is allowed only to the extent that “comparable” or “equivalent” opportunities are available to US firms in the home country of the investor. In some cases, such requirements may not even be related to the sector in which the foreign company wants to be economically active in the US (“cross-sectoral reciprocity”).

#### ***Performance requirements***

Relating either to the contribution of the foreign controlled company’s activities to the US economy and employment, or to the realisation of specified parameters of production (volume, local content).

#### ***Public subsidies***

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a foreign owned company legally established in the US meets certain conditions and requirements. CNT language is most notable in the area of science and

technology and concerns the granting of Federal subsidies for R&D or other advantages to US-incorporated affiliates of foreign companies.

Examples of conditional national treatment are: the *American Technology Pre-eminence Act* of 1991, which authorises the Advanced Technology Program, an industry-led, cost-shared R&D programme, designed to develop high risk technologies that the private sector is unlikely to pursue without government support; the *Energy Policy Act* of 1992 that authorises Federal programmes and joint ventures between industry and government laboratories in energy-related R&D; the *National Co-operative Production Act* of 1993, which extends the favourable antitrust treatment applying to joint R&D ventures to joint manufacturing ventures; and the Advanced Lithography Program which deals with research on semiconductor materials and processes.

Although US subsidiaries of European firms have been able to participate in US programmes, the fact remains that satisfying the eligibility conditions can be a more cumbersome process for foreign-owned companies.

## 6.2 Tax Discrimination

Several aspects of US taxation practices constitute additional difficulties to foreign investment in the US market. Those are mainly related to the nature of reporting requirements, conditions for deductibility of interest payments and State “world-wide” unitary taxes. In addition, the US has failed so far to remedy the WTO inconsistency of its *Foreign Sales Corporations* (FSC) legislation, considered as an export subsidy by the WTO Appellate Body (See Section 5.10 on “Subsidies”).

### *Reporting requirements*

The information reporting requirements of the US tax code as applied to certain foreign-owned corporations mean that domestic and foreign companies are treated differently. These rules apply to foreign branches and to any corporation that has at least one 25% foreign shareholder. They require the maintenance or the creation of books and records relating to transactions with related parties. The documents must be stored at a place specified by the US tax authorities and an annual statement filed containing information about dealings with related parties. There are stiff penalties for non-compliance with the various provisions. These requirements are onerous. Although their purpose, the prevention of tax avoidance and evasion, is reasonable, they are burdensome and add to the complexity for foreign-owned corporations of doing business in the US.

### *“Earnings stripping” provisions*

The so-called “earnings stripping” provisions in the *Internal Revenue Code 163j* limit the tax deductibility of interest payments made to “related parties” which are not subject to US tax, and of interest payments on loans guaranteed by such related parties. In practice, most “related parties” affected will be foreign corporations.

The provisions are designed to prevent foreign companies from avoiding tax by financing a US subsidiary with a disproportionately high amount of debt as compared with equity, with the result that profits are paid out of the US in the form of deductible interest payments rather than as dividends out of taxed income. This objective is reasonable and in line with internationally agreed tax policy. However, the US rules for calculating the ceiling in any year on the amount of admissible interest, uses a formula the results of which can be inconsistent with the internationally accepted arm’s-length principle. If, ultimately, this leads to the disallowance of relief for the interest payable, it could have discriminatory consequences because a tax treaty partner would not be obliged to make a corresponding adjustment to taxable profits in the other country. The provisions relating to loans guaranteed

by related parties could also disallow the interest on a number of ordinary commercial arrangements with US banks and provide a disincentive from raising loans with them.

Finally, it must be noted that House & Means Committee Chairman Bill Thomas has introduced legislation (HR 5095 *The American Competitiveness Act and Corporate Accountability Act*) whose provisions are designed to prevent US companies from "inverting" to a foreign tax haven. However, the provisions as currently drafted will affect all legitimate foreign subsidiaries in the US (rather than US companies which are trying to avoid paying US taxes by moving a "mail-box" to a foreign tax haven), with the result that the earnings stripping rules would be even more onerous than current law. Such legislation, if passed into law, could negatively impact FDI into the US.

***State unitary income taxation***

Certain US States (Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia) and the District of Columbia, assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total world-wide profits. This proportion is calculated in such a way that a company may have to pay tax on income arising outside the State, giving rise to double taxation.

***World-wide unitary taxation***

US State worldwide unitary taxation is inconsistent with bilateral tax treaties concluded by the US at the Federal level, and a company may face heavy compliance costs in providing details of its worldwide operations. International attention has focused mainly on California, which from 1986 has allowed companies to elect for "water's edge" unitary taxation. Under this method, companies are taxed on the basis of a share of their total US (rather than worldwide) income. The 1994 US Supreme Court ruling that California's former worldwide unitary tax was constitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

## 7 INTELLECTUAL PROPERTY RIGHTS

Several aspects of the US intellectual property legislation are inconsistent with US international commitments (e.g. the lack of recognition of "moral rights" to authors, the lack of prompt notification of government use of patents, or the insufficient protection of geographical indications). Some of those US provisions have been found incompatible with the TRIPs Agreement by DSB rulings (i.e. Section 110(5) of the US Copyright Act, and Section 211 of the Omnibus Appropriations Act). Moreover, the "first-to-invent" principle governing US patent registration continues to create considerable interface problems for EU companies, not to speak of the financial effects of high administrative and litigation costs in patent matters.

### 7.1 Copyright and related areas

#### *Moral rights*

Despite the unequivocal obligation contained in *Article 6bis of the Berne Convention*, to which the US acceded in 1989, to make "moral rights" available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the future. It is clear that while US authors benefit fully from moral rights in the EU, the converse is not true, which leads to an imbalance of benefits from Berne Convention membership to the detriment of the European side. It is noted that the US has ratified and implemented the *World Intellectual Property Organisation (WIPO) Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*. Adherence to these Treaties by the US requires legislation on moral rights at least for performers.

#### *Licensing of music works*

*Section 110(5) of the 1976 US Copyright Act* provided for an exemption to the author's exclusive rights to authorise the communication of their works to the public ("homestyle exemption"). Concretely, Section 110(5) permits the playing of "homestyle" radios and televisions in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.

Following a complaint under the Trade Barriers Regulation, the Commission determined that Section 110(5) violates US obligations *under Article 11bis(1) of the Berne Convention for the Protection of Literary and Artistic Works* and consequently those *under Article 9(1) of the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPs)*.

The described practice has caused a serious deprivation of income to EU right-holders, as a large number of commercial establishments do not pay any royalty fees. Moreover, the incomplete copyright protection in the US has broader economic effects negatively affecting the overall position of authors on the US market.

On 6 October 1998 an amendment was approved by the Congress ("*Fairness in Music Licensing Act*") substantially widening the scope of the homestyle exemption. As a result, the effects on Community right-holders worsened. At the request of the EC and its Member States, at the DSB meeting of 25 May 1999, a Panel was established.

The Panel report, circulated on 15 June 2000, found that the most important of the two subparagraphs of Section 110(5) (paragraph B) was in breach of US obligations under the TRIPs Agreement. The matter was put to arbitration for determination of a "reasonable period of time". The arbitrator held on 15 January 2001 that such a period was 12 months after adoption of the Panel report (i.e. 27 July 2001). The EC agreed to an extension by the

DSB of the implementation period until the end of 2001 on the basis of two premises: that the US would negotiate a solution for the benefit of the EU right holders affected by the operation of Section 110(5)(B) of the US Copyright Act; and that an arbitration procedure under article 25 of the DSU would determine the nullification and impairment of EU benefits due to that WTO incompatible provision.

The arbitration award, circulated on 9 November 2001, determined that the level of nullification and impairment was equal to \$1,219,900 per year. Talks with the US continued after the arbitration procedure and the parties eventually found common ground regarding a possible future mutually acceptable arrangement. A formal arrangement will however only intervene if the US Administration obtains funding from Congress to provide financial assistance to EU music rights societies with a view to developing activities for the promotion of authors' rights, pending compliance with the DSB recommendations and rulings.

The extended reasonable period of time expired on 20 December 2001 and Congress had not yet approved the above-mentioned payments. Moreover, there were no legislative initiatives to bring the Copyright Act into compliance with the TRIPs Agreement (see Section 9 below). In these circumstances, the EC had to make on 7 January 2002 a request for the authorisation of suspension of concessions, in order to safeguard its rights. This request consists in particular in the authorisation of the levy of a special fee to US right holders that apply for action by the EU customs authorities to block pirated goods. On 18 January, the US requested arbitration on the proposed suspension of obligations. The parties requested the suspension of the arbitration procedure until 1 March 2002. Thereafter, any party may reactivate the procedure if a satisfactory agreement has not yet been finalised. The US has not yet taken the necessary action for the implementation of the agreed temporary solution. While the payments are now authorised under the Trade Act of 2002, Congress has not yet appropriated the funds.

## **7.2 Appellations of Origin and Geographical Indications**

### ***Wine***

#### Inadequate protection

The amendment to the US trademark law (new *subsection 2(a) of the Lanham Act*) adopted for the purpose of implementing *Articles 23.2 and 24.5 of the TRIPs Agreement* creates grounds for refusal or cancellation of a trademark that consists of, or comprises, a geographical indication (GI) which, when used on -or in connection with- wines or spirits, identifies a place other than the origin of the good. It remains unclear how this provision will apply in the US as GIs are to be protected via certification trademarks under US law. In addition, the above-mentioned amendment does not apply to indications that an applicant first used in connection with wines or spirits before the TRIPs Agreement entered into force. However, Art. 24.5 TRIPs allows continued use only of those trademarks used or registered in good faith before 1995 or before the geographical indication is protected in its country of origin. Thus, it will have to be closely followed whether the US complies with its TRIPs obligations, by ensuring that a trademark used or registered in bad faith in the US can no longer be maintained where it is identical with or similar to a geographical indication.

#### Semi-generic names

US regulations allow some EU geographical denominations of great reputation to be used by American wine producers to designate products of US origin, many being used in word and service marks, even for products other than wines. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Madeira, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne and Sherry. In 1997, the *D'Amato amendment* codified US

regulations on the use of semi-generic wine names in the US into Federal law. While some States prohibit the use of these names on non-originating wines, in others those names are widely misused. This both misleads consumers and undermines the reputation of the genuine wines.

#### Grape names

American producers also use some of the most prestigious European geographical indications as names of grape varieties. This could mislead consumers as to the true origin of the wines.

All these issues are being discussed in the framework of the bilateral negotiations for an agreement on trade in wines.

#### *Spirits*

With regard to spirits, an agreement was approved by the EU in February 1994 for the mutual recognition of two US and six EU geographical indications and provides for future discussions on the possibilities of extending their mutual recognition. For the other EU designations, the US regulations provide a limited protection but do not prohibit their improper use: a geographical indication when qualified by ATF as “non-generic distinctive” may be used for spirits not originating in the place indicated but with a proviso such as “kind”, “type”, etc. in conjunction with the true origin of the product. This appears to violate *Article 23.1 of TRIPs*, which expressly prevents use of a geographical indication for spirits not originating in the place indicated, even where the product's true origin is indicated or accompanied by an expression such as “kind”, “type”, “style”, “imitation” or the like.

In addition, it should be noted that the US protects geographical indications *under Article 22 TRIPs* only in as much as they may mislead consumers rather than *per se*. The practical approach would appear to be insufficient in the light of the TRIPs requirement that, while granting some leeway as to the means of protection, does not permit inadequate protection. Certain EU agri-food producers have seen their interests affected adversely by the US approach.

### **7.3 Patents, Trademarks and related areas**

#### *Measures affecting imported goods*

##### Section 337 of the US 1930 Tariff Act

*Section 337 of the Tariff Act of 1930* provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US (“exclusion order”) or to have them removed from the US market once they have come into the country (“cease and desist order”). These procedures are carried out by the US International Trade Commission (ITC) and are substantially different from the internal procedures in the case of domestic goods that allegedly infringe US intellectual property rights. Notably, the means of defence under the Section 337 procedure are limited. Under the *1988 Omnibus Trade and Competitiveness Act*, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent. The GATT Panel report, which was adopted by the Contracting Parties in November 1989, concluded that Section 337 was inconsistent with Article III:4 GATT. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded to like US products. Some modifications have been made to Section 337 in the context of implementing TRIPs. However, in its present form, Section 337 does not eliminate the major GATT inconsistencies raised by the 1989 GATT Panel. As a result, Section 337 appears to continue to be in violation of Article III: 4 GATT and of a number of provisions contained in TRIPs.

On 28 February 2000, the EC and its Member States held WTO consultations, with no positive outcome. Since then, the ITC has started new investigations against a number of European and Canadian companies. The Commission is concerned by these developments and it regularly raises the "Section 337" issue in its bilateral contacts with the US Administration. The Commission does not discount further action at the WTO level.

Advertising practices on EU perfume imitations

Advertising low price perfumes imitating famous European brands, and thus benefiting from the well-known reputation of the European brands, is not prohibited. This practice may violate *Article 6bis* and/or *Article 10bis of the Paris Convention* (concerning confusion and unfair competition, respectively), as incorporated into the TRIPs Agreement through its *Article 2.1*.

***US Government use of patents***

The manufacture or use of goods by or for the US government authorities is apparently extremely widespread. *Article 31 of the TRIPs Agreement* introduces a requirement to inform promptly a right holder about government use of his patent. However, it appears that the US government departments frequently fail to comply with such obligation. Right holders, and particularly foreign ones, are therefore likely to miss the opportunity to initiate an administrative claims process.

***US "First-to-invent" system for patent registration***

European companies are faced with indirect costs resulting from the 'first-to-invent' system for patent registrations in the US. The US patent system is the only one to apply the principle of 'first-to-invent'. The rest of the world follows the principle of 'first-to-file', fixing thereby a clearly defined moment when the priority right to a patent is established. The 'first-to-invent' principle creates several obstacles for EU and US companies trying to obtain a patent right in the US, namely because it has a considerable economic impact on the potential right holder. The issue has figured on top of the TABD agenda and the latter has recommended the adoption of the 'first-to-file' approach in the US.

***Patentability of software and business methods***

US and European law take different approaches to the question of patents covering entities such as innovative business methods and computer programmes. Generally, such subject matter can be patented in the US, but not in the EU and many other countries unless it has a distinctive technical character. This requirement, known as the "technical contribution" requirement, exists currently only in case law but would be codified and harmonised under Community law by a Directive which was proposed by the Commission in February 2002 and is currently under discussion in the European Parliament and the Council.

This difference in approach means that EU companies operating on the Internet or directly in the US market may encounter problems if their activities are free of patents in their home markets but fall within the scope of valid US patents.

The "technical contribution" issue along with "first to file/first to invent" and other questions of substantive patent law (such as a grace period and utility/industrial application), are the subject of on-going negotiations in the context of the WIPO discussions on the draft *Substantive Patent Law Treaty*.

***Section 211 of the US Omnibus Appropriations Act***

*Section 211 of the Omnibus Appropriations Act*, adopted in October 1998, prohibits, under certain conditions, the registration or renewal of a trademark that is identical or similar to a trademark previously owned by a confiscated Cuban entity and sets forth that no US Court shall recognise or enforce any assertion of such rights.



In the view of the Commission and the Member States, Section 211 violates several provisions of the TRIPs Agreement, notably on national treatment and most-favoured-nation treatment, the protection of trademarks and enforcement. Section 211 was already applied in a case involving a European company that was not able to defend its trademark rights before a US court as a consequence.

After WTO consultations failed, in March 2000 the EC and its Member States decided to request the establishment of a WTO Panel on Section 211. The Panel's report was issued on 6 August 2001 and confirmed that Section 211 was in violation of *Article 42 of TRIPs* by denying trademark owners access to the courts. Furthermore, it stated expressly that Section 211 should not apply when the trademark has been abandoned. However, there were two points where the Panel did not agree with the EC's interpretation of the compatibility of Section 211 with WTO rules. The Panel considered that trade names are not covered by TRIPs and that TRIPs does not regulate the question of the ownership of intellectual property rights.

Both the EC and the US decided to appeal the Panel ruling. The Appellate Body report was issued on 2 January 2002. According to this report, Section 211 is in violation of both the national treatment and the most favoured nation obligations of the TRIPs. The Appellate Body held that, in pursuing their policy against confiscation of assets in foreign territory, the US cannot discriminate in favour of US right holders or treat Cubans less favourably than other foreigners. The decision is also satisfactory from a systemic viewpoint, as it reversed the panel finding that trade names are not covered by the TRIPs discipline: the Appellate Body confirmed that, under the TRIPs, WTO Members do have an obligation to protect trade names. However, the Appellate Body found that the US statute was in conformity with Article 42 of the TRIPs Agreement, thereby reversing the panel findings on that point.

The EC and the US reached an agreement on the reasonable period of time for the US implementation of the Appellate Body ruling. This period will expire when the on-going session of Congress adjourns and no later than 3 January 2003. In addition, the US Administration has officially acknowledged that compliance calls for legislative action by US Congress.

### ***Internet domain names and cyber squatting***

The EU strongly supports a uniform worldwide system for the protection of trademarks in Internet domain names based on the WIPO's recommendations for an administrative dispute resolution procedure and the ICANN Uniform Dispute Resolution Policy. The EU is concerned about the potential impact on this uniform approach of the US 1999 *Anti-cybersquatting Consumer Protection Act* (see Section 8.2 below).

## 8 SERVICES

### 8.1 Business Services

#### *Professional Services*

Following the conclusion of the GATS negotiations in 1993, the access of professional service suppliers to the US has been improved since a number of nationality conditions and in-State residence requirements have been removed.

However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in -and divergence of- access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers. In addition, the application of Buy America and positive discrimination provisions, as well as burdensome visa procedures for registration and for obtaining work permits, make it difficult for foreign suppliers of professional services to enter the US market.

Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services has agreed on disciplines applicable to accountancy services, and the new Working Party on Domestic Regulation will continue working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the WTO Doha Development Agenda.

### 8.2 Communication Services

In spite of the commitments made in the WTO, in particular those pursuant to the GATS Basic Telecommunications negotiations concluded in 1997 and which entered into force in February 1998, European and other foreign-owned firms seeking access to the US market still face important barriers, particularly in the mobile services sector (e.g. investment restrictions, lengthy and burdensome proceedings, protectionist attitudes in certain congressional circles and lack of access to frequencies for 3<sup>rd</sup> generation services) and in the satellite services sector (e.g. lengthy proceedings, conditionality of market access, *de facto* reciprocity-based procedures). The EU notes that there have been gradual improvements on a number of issues since its last report. However, as exemplified by the protectionist bills introduced in Congress in 2000 and 2001 and the lengthy proceedings to allow transfer of licences, market access is still not fully ensured and this situation is not in line with the market access policy advocated by the US. Indeed, it provides a competitive advantage to the significant number of US companies that already have access to the EU market in these fields.

#### *WTO commitments on telecommunications services*

The US first scheduled commitments in the WTO on value added services (such as electronic mail or Electronic Data Interchange) at the end of the Uruguay Round in 1994. However, these commitments are limited to those services supplied over common carrier networks

(thereby excluding cable networks, for instance) and are based on a domestic definition of the "value-added nature" of the services, which introduces uncertainty as to the scope of the US commitments. The US also scheduled commitments on broadcasting services (Radio and Television Transmission Services), allowing access to its market while retaining restrictions on the share of foreign ownership.

Later, the negotiations on Basic Telecommunication services, held in the GATS framework under the auspices of the WTO, concluded successfully on 15 February 1997. At that time, 69 governments undertook legally binding commitments on access to their telecommunications services' market, thereby liberalising a global market estimated to be worth approximately US\$600 billion (i.e. over 90% of total global revenues for telecommunications services). The *WTO Basic Telecom Agreement* entered into force in February 1998.

At the time, the US undertook commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic, long-distance and international, using any kind of technology; etc.), but retained several restrictions. Foreign direct investment in US companies holding common carrier radio licences is limited to 20% (indirect investment being allowed up to 100%). The US also kept a market access restriction on satellite-based services, namely the monopoly of Comsat to link up with Intelsat and Inmarsat (US legislation, the *ORBIT Act*, removed the Comsat monopoly in 2000, see below). Late in the negotiation, the US took an exemption to the MFN principle for one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services. This MFN exemption allows discriminatory treatment of foreign companies and may impair European interests. The EU reserved its right to challenge this exemption as it applies to services that are part of the audio-visual commitments undertaken by the US in 1994 as a result of the Uruguay Round.

In November 1995, in the run-up to the WTO negotiations on Basic Telecommunications, the Federal Communications Commission (FCC) had adopted a rule on entry of foreign-affiliated carriers into the US market, adding a new factor to the FCC's public interest review for the purpose of granting waivers to those restrictions on foreign indirect investment imposed by *Section 310 of the 1934 Communications Act*. Specifically, the FCC introduced an "Effective Competitive Opportunity Test" (ECO-test). The FCC also issued in May 1996 a notice of proposed rulemaking applying the ECO-test to foreign-licensed satellites. The EU submitted objections in both proceedings. On 25 November 1997, the FCC adopted two rulings (a general ruling on foreign participation in the US market, and a specific one on the satellite services market entitled DISCO-II) to implement the commitments of the US in the Basic Telecom Agreement. In these rulings the FCC replaced the ECO-test with a rebuttable presumption that entry by carriers from WTO countries and by satellites licensed by WTO countries is pro-competitive, but the FCC retained the unclear "public interest" criteria which can still be invoked to deny a licence to a foreign operator for various motives, such as "trade concerns", "foreign policy concerns" and "very high risk to competition". Although the FCC expressed its intention to only deny market access on this basis in exceptional circumstances (which are not well defined) the discretion retained by the FCC remains of concern to the EU and raises questions as to the compatibility of the FCC rules with US WTO commitments.

### ***Foreign investment***

*Section 310 of the 1934 Communications Act* establishes restrictions to foreign investment in US companies holding a broadcast or common carrier radio license. The US has undertaken commitments in the framework of the Basic Telecom Agreement to suppress restrictions to indirect investment from 1 January 1998. However, the US Administration holds the view that it is not necessary to adopt specific legislation to abolish such investment restrictions, since the FCC may waive these restrictions under the current law by invoking the "public interest." The US Administration and the FCC consider that this waiver provision is sufficient for the FCC not to apply *Section 310(b)(4) of the 1934 Communications Act* to WTO Members. This situation, however, does not provide certainty to European operators.

The FCC proceeding initiated in September 2000 by the application by Deutsche Telekom (DT), VoiceStream and Powertel for a transfer of control of licenses from VoiceStream and Powertel to DT in the course of DT acquisition of these mobile carriers, and concluded on 24 April 2001, shows that foreign investment in the US still faces uncertainty and lengthy proceedings.

Legislation introduced by Senator Hollings in 2000 and again in 2001 would, if adopted, constitute a clear violation of US commitments in the WTO on foreign investment and would negatively affect the interests of European companies. The EU will remain vigilant and oppose any action, through legislation or otherwise, that would undermine US WTO commitments.

### ***Universal service***

The current universal service and access charge regimes in the US require further clarification, in particular with a view to ensuring that foreign consumers are not subsidising universal service obligations in the US.

Existing restrictions on access to the US market in specific communication sectors are described below.

### ***Radio and mobile communications***

*Section 310 of the Communications Act of 1934* remains basically unchanged following the adoption of the *Communications Act of 1996*. It contains restrictions on the holding and transfer of broadcast and common carrier radio communication licences: no broadcast or common carrier (or aeronautical en route or aeronautical fixed radio station) licence shall be granted to, or held by, foreign governments or their representatives, aliens, foreign corporations, or corporations of which more than 20% of the capital stock is owned or voted by a foreign entity (25% if the ownership is indirect subject to a public interest waiver). The one change brought about by the new Act was to eliminate the restriction on foreign directors and officers.

The Basic Telecom negotiations in the WTO did not change the situation with respect to foreign direct investment, as limitations on direct foreign ownership of common carriers radio licences have been explicitly retained in the US schedule of commitments.

To provide telecommunications services, operators typically need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Foreign-owned US operators face additional obstacles in obtaining the licensing of these various elements relative to US-owned firms.

### ***Broadcast communications***

Section 310 of the Communications Act of 1934 also applies to the broadcast sector: foreign direct investment in US companies holding a broadcast license is limited to 20%, and foreign indirect investment to 25% subject to a public interest waiver, a possibility the FCC has hardly used. As a result, the US broadcasting market today is hardly accessible to foreign media companies.

A series of recent Federal court rulings, unless overturned by the Supreme Court, are expected to lead to a relaxation of media ownership rules within the US market, and to another round of media acquisitions in the US during the coming months, causing further consolidation acquisitions by current television station owners (Viacom, Disney and News Corp.), as well as first-time acquisitions by large US cable operators (AOL Time Warner, Comcast). Non-US companies will not be able to participate in this development because of the existing foreign ownership restrictions. For the future, the expected consolidation within the US broadcasting market will raise market entry costs for foreigners considerably.

***Mobile communications: third generation systems***

Access of third generation (3G) mobile communication systems to the US market could be restricted due to lack of availability of frequencies in the US. This concern has arisen following the US decision to allocate to second generation systems the frequency bands which had been identified for third generation systems by the International Telecommunications Union (ITU) at its World Assembly Radio-communications Conference in 1992. These frequency bands are generally available for third generation systems in European and in most of the other countries throughout the world, as these countries have followed the 1992 ITU recommendation. The World Assembly Radio-communications Conference in May 2000 (WRC-2000) identified additional spectrum for third generation systems. In October 2000, the US Administration recognised for the first time in a Memorandum by the US President that "Third generation wireless systems need radio frequency spectrum on which to operate. Executive departments and agencies and the FCC must co-operate with industry to identify spectrum that can be used by third generation wireless systems, whether by reallocation, sharing, or evolution of existing systems, by July 2001". The USG objective is to allow the FCC to auction 3G spectrum by September 2002, though recent developments indicate that this may take longer. The process is primarily focused on the spectrum identified at WRC-2000, which is already being used in the US by commercial telecommunications, television, national defence, law enforcement, air traffic control, and other services. The process has led already to a number of interim reports and the EU will continue to monitor it. In particular, it is necessary to ensure that the US market is open to European and foreign country operators that are potential new entrants in the market, as well as to provide regulatory certainty to companies interested in investing in these new technologies in the US.

***Satellite Communications***

In the past few years, European satellite carriers have encountered serious problems in serving the US market<sup>2</sup>. Notably, the following cases have been brought to the Commission's attention: Inmarsat Ventures plc.<sup>3</sup>, New Skies Satellites N.V.<sup>4</sup>, Eutelsat<sup>5</sup> and SES Global<sup>6</sup>.

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<sup>2</sup> Please note that "a satellite operator applying for market access to the US" means in practice that one or more US earth station operators apply to the FCC for a license to link up with the satellite(s) of that operator. The FCC process entails the allocation of certain frequency bands and/or orbital slots. Non-US satellite operators may also directly petition the FCC to add their satellites to the "Permitted Space Station List" which, if granted, allows all US licensed earth stations to communicate in the standard C and Ku-band frequencies without the need for further licensing.

<sup>3</sup> Inmarsat Ventures plc has access to the US market for maritime and international aeronautical services but access is not yet assured for land-mobile services, although Inmarsat has been privatised since April 1999 and is now a UK-based company. Inmarsat access to the US market should not be restricted but the FCC granted a license to Inmarsat in October 2001 after applying the *ORBIT Act* criteria to determine whether the privatisation of Inmarsat was pro-competitive and the "DISCO II" regulatory framework. The FCC grant is subject to further review after Inmarsat conducts an Initial Public Offering (IPO), or revocation should Inmarsat fail to conduct an IPO as required by the *ORBIT Act*. After it conducts its IPO, Inmarsat will have to show that there has been substantial dilution of the aggregate ownership of the company of its former Signatories. The deadline for the IPO has been postponed several times, in recognition of the state of the financial markets, most recently via legislation until 31 December 2002.

<sup>4</sup> The Netherlands-based New Skies Satellites N.V. (the privatised Intelsat spin-off) was granted market access to the US in August 1999 to provide Fixed Satellite Services (excluding Direct to Home services) for a 3-year duration only (compared to the standard renewable 10-year term). The FCC considered that New Skies was not independent enough from Intelsat and that, therefore, unconditioned access to the US market could have triggered anti-competitive risks due to potential difficulties for US companies to obtain access to foreign markets from national regulatory authorities having a wish to protect New Skies. New Skies made since then an IPO of shares and the results of this IPO satisfied the FCC (i.e., resulted in a "substantial dilution" of Intelsat Signatories' ownership) and entitled US licensees accessing New Skies' satellites to the standard 10-year earth station license, granted by the FCC in April 2001. This case shows that the US regulation (DISCO II and its "competition criteria") is actually carried out in a manner that violates US commitments in the WTO (in practice, the FCC still applies a reciprocity mechanism similar to the "ECO-test" by linking market access in the US to market access for

These cases show that proceedings by the FCC on spectrum allocation and licensing are not always carried out in an objective, transparent, timely and non-discriminatory manner, and raise concerns regarding their compatibility with US WTO commitments. Fortunately, the goodwill of the companies involved has permitted positive outcomes in some cases.

In parallel to these individual cases, Congress considered for nearly two years legislation that sought to promote a pro-competitive privatisation of Intelsat, Inmarsat, and their successor and spin-off entities. Various bills sought to unilaterally impose the specific criteria and timetables for the privatisation of these entities.

The "*Open-market Reorganisation for the Betterment of International Telecommunications Act*" (*ORBIT Act*) was finally adopted by Congress and signed on 17 March 2000 by President Clinton. The final text represents an improvement compared to earlier versions (hopefully as a result of the *démarches* made by the EU and its Member States). It gives more time, for instance, to those entities to conduct Initial Public Offerings (IPOs) and meet the Act's privatisation criteria, but it still imposes conditions on entry into the US market of Intelsat, Inmarsat Ventures plc and New Skies Satellites NV. It contains guidelines for the US administration to influence the privatisation process of these companies<sup>7</sup> and to use that privatisation process to pursue wider objectives<sup>8</sup>. President Clinton, on signing this bill into law, stated that the "provisions of S. 376 could interfere with the President's constitutional authority to conduct the Nation's foreign affairs" and that he "will therefore construe these provisions as advisory". The Act also includes statutory privatisation criteria that the FCC must apply in order to determine whether to grant market access to these entities. The President thus also stated that the Administration would continue to advise the FCC (which is an independent agency) on matters concerning interpretation of and compliance with US WTO obligations.

However, there is serious concern in the EU that these criteria apply to no other competitor, foreign or domestic and could lead the FCC to limit these entities' access to the US market and thereby reduce competition in the US market (contrary to the explicit intent of the Act to promote competition). In that respect, the Act violates WTO obligations and if used against EU operators' interests, the EU reserves its rights of arbitration procedures under the WTO.

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US operators in third countries). In addition, the *ORBIT Act* continues to apply to New Skies, even though the firm passed the FCC scrutiny after the Act.

<sup>5</sup> Eutelsat (an Inter-Governmental Organisation based in France and privatised 2 July 2001) faced last year a competing claim by a US company, Loral Skynet, to use a specific orbital location to provide Fixed Satellite Service to and from the US, in spite of the priority rights it had acquired under the ITU process. Eutelsat and Loral finally came to an agreement in December 1999, as it became clear that the FCC would not allow US earth station operators to link up with Eutelsat's satellite at the disputed orbital location in the absence of a settlement with Loral Skynet. In particular, there is a concern that the FCC leveraged its regulatory clout to the advantage of Loral and brought Eutelsat to the negotiating table. Absent this, and given ITU rules of filing priority, Eutelsat would have had no incentive to engage into settlement discussions. Eutelsat's existing customers have now received FCC authorisation to link up with its satellite. FCC also took the decision to allow future customers to automatically link up with its satellite. This case raises questions about the compatibility of US domestic procedures with the GATS provisions on Domestic Regulation.

<sup>6</sup> The FCC authorised in October 2001 the transfer of control of GE Americom and Columbia Corp. from GE Capital Corp. to SES Global as being "in the public interest", subject to FCC approval of increases in the indirect interests held by non-US investors.

<sup>7</sup> Mainly by calling on the US administration to achieve the bill's objectives in international fora, by requiring that the US administration oppose any application by these entities for additional orbital locations in the ITU and by requiring that the US administration ensure that the US remain the administration responsible for Intelsat notification to the ITU.

<sup>8</sup> Specifically, the bill requires the US administration to pursue a cost-based settlement policy for international telecommunications, and to oppose assignment by competitive bidding of orbital locations or spectrum for the provision of international or global satellite communications services.

Finally, the US keeps restrictions on the provision of one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services, following the exemption to the MFN principle taken by the US at the very last moment of the GATS negotiations on basic telecom services.

#### ***Satellite navigation, positioning and timing systems***

The Commission and the US have engaged in a negotiation to co-operate in the Global Navigation Satellite. Both parties have recognised the need to keep a future bilateral agreement relating to the interface between the GPS and GALILEO within the existing international trade system and consistent with relevant WTO multilateral rules.

#### ***Digital terrestrial television***

In 1996, the FCC mandated an exclusive transmission standard for digital terrestrial television in the US, known as ATSC. This decision has prevented the technology (DVB-T) developed in Europe and being adopted in several countries around the world, from entering into the US market. Several market players in the US have called for a review of the FCC decision regarding, at least, the modulation system of the ATSC transmission standard so as to allow the market to choose the technology best suited for the innovative services and applications to be offered to consumers. Nevertheless, the FCC confirmed its decision in a January 2001 Order, following a period of comparative tests between ATSC and DVB-T modulation systems held in the US whose procedure and results have been disputed by the DVB-T industry. This is in clear contradiction with US Government's calls for technological neutrality and market driven approaches in other sectors, such as mobile communications.

Moreover, as another example of regulatory intervention in this market, the EU notes that on 8 August 2002, the FCC adopted an order requiring that almost all television receivers include digital television reception capability after 1 July 2007 (beginning on 1 July 2004, with receivers with screen sizes 36 inches and above). This order, which aims to speed the conversion to digital television, will further strengthen the position of the ATSC digital transmission standard in the US market.

#### ***Internet domain names and cyber squatting***

The Commission welcomes the development of alternative dispute resolution (ADR) for the Internet DNS and has, together with the US and other countries, supported the recommendations of WIPO for an administrative dispute resolution procedure and the implementation of the *ICANN Uniform Dispute Resolution Policy (UDRP)*

In parallel to the adoption in August 1999 and the implementation in November 1999 by ICANN of the UDRP, the US enacted the *Anticybersquatting Consumer Protection Act in November 1999*. This Act entitles the owner of a mark registered in the Patent and Trademark Office to file an *in rem* civil action against a domain name. In the case of violation of the owner's right of a mark by a domain name in the judicial district in which a domain name registrar or registry is located, the 1999 Act also allows a plaintiff to elect to recover statutory damages between \$1,000 and \$100,000.

The Commission supports the view that a worldwide system based on the WIPO's recommendations would be beneficial to the whole Internet community and should be allowed to proceed rather than being pre-empted by national legislation. The Commission has some reserves about the possible impact that it could have on the use of the UDRP as trademark owners may prefer to act under the US legislation rather than the UDRP.

The Commission is further concerned by the fact that other countries might enact further legislation, similar or divergent, creating a situation of "patchwork" legislation world-wide which could affect the uniform approach proposed under the WIPO and ICANN dispute resolution scheme, in particular at the stage where the WIPO system might be extended to address Famous Names and other categories of names dispute.

In this respect, the Commission re-affirms its support to the UDRP that has been put in place by ICANN and WIPO and, apart from the questions related to the protection of geographical names, it endorses the outcome of the report prepared by the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), which presents the options for the treatment of the issues dealt with in the Second WIPO Internet Domain Name Process (the "Second Process Report", published on 3 September 2001), and which would be transmitted to the meetings of the WIPO General Assembly in September 2002 for consideration and decision.

As concerns the protection of geographical indications against cybersquatting, the Commission considers that it is urgent to take the necessary measures to include these identifiers in the scope of application of the UDRP.

### **8.3 Financial Services**

The pace of affiliations between banks and securities houses and the conduct of insurance activities by banks began picking up prior to the enactment of the *Gramm-Leach-Bliley Act of 1999* (GLBA). Electronic commerce is also beginning to have an impact on the delivery of all kinds of financial products. There is increasing convergence between the US and EU financial sectors, with a number of acquisitions of US brokerages and insurance companies by EU firms. In this dynamic environment, it is important that EU financial firms be given competitive opportunities in the US market comparable to those afforded to US institutions as new laws are passed, regulations are adopted and the market evolves. The Commission is currently studying the possible impact of the recently enacted Sarbanes-Oxley Act of 2002, which might cause certain difficulties to EU companies.

In addition, it must be noted that the EU and the US have agreed to pursue a *Financial Markets Dialogue* in the framework of the positive agenda.

#### ***WTO Financial Services negotiations***

In this regard, the European Commission is working to improve access of European financial institutions to US markets in a number of key sectors, including the new financial activities permitted under GLBA and reinsurance and other wholesale insurance markets.

Financial services negotiations in the framework of the GATS are particularly important. A permanent and MFN-based agreement entered into force in March 1999 and GATS negotiations on financial services were relaunched in Geneva in 2000 to increase regulatory transparency in the US and other markets and ensure national treatment for EU institutions.

#### ***Banking***

In 2000, following intervention by the Commission, the Federal Reserve agreed to waive the "leverage ratio" requirement for EU banks wishing to qualify as financial holding companies (FHCs) under the GLBA. However, concerns still remain over the extent to which the Federal Reserve will take into account the views of the home country supervisory authority in assessing FHC applications.

The international banking community has also voiced concern over the requirement of the Office of the Comptroller of the Currency (OCC) and some State banking supervisors to maintain "asset pledges" in addition to the paid up capital they maintain in their home country.

#### ***Insurance***

A remaining impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 54 different jurisdictions, with different licensing,



solvency and operating requirements. Each state has its own insurance regulatory structure and, by contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies. However, interest in establishing a federal statutory structure for licensing and regulation of insurance is growing.

The US regulatory/supervisory structure is far behind that of the EU, and this entails heavy compliance costs for EU companies in each of the 54 jurisdictions. The National Association of Insurance Commissioners (NAIC) is making a tentative attempt to harmonise some basic regulatory requirements between the states, but this will be a long process. The NAIC's recommendations are not binding, so even if state insurance commissioners agree to some further harmonisation, implementation at state level cannot be guaranteed. Allied to the costs involved in dealing with this outdated regulatory structure, EU companies also face direct discrimination on a number of fronts. For example:

- not all states have "port of entry legislation"; in other words, to underwrite risks in one state, an EU insurance company must first be licensed in another state before seeking a licence in the first state;
- some states require their insurers to buy reinsurance from state-licensed companies, before allowing reinsurance premiums to leave the state;
- those EU companies that specialise in the US\$ 9 billion "surplus lines" market (large industrial, transport, or hard-to-place risks), such as Lloyd's and the Paris market have to be "white-listed" by the NAIC to operate on a cross-border basis in the US. In order to receive approval, companies have to, *inter alia*, name a US attorney and lodge a trust fund in a US bank of up to US\$ 60 million. No credit is given for the fact that EU companies are effectively regulated in the EU or for situations where the retrocession takes place to US domestic insurers. Partly as a result of these requirements, the market share of Lloyd's on the surplus lines market has dropped from 20% to 14% over the last 10 years. Other non-US companies share of the market has dropped from 12% to 9% over the same period.

### **Securities**

EU securities firms may register as broker-dealers or investment advisers, and in principle may establish both in the form of branches or subsidiaries. However, the establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation. Foreign mutual funds have not been able to make public offerings in the US because the SEC's conditions make it impracticable for a foreign fund to register under the *US Investment Company Act of 1940*.

In addition, the SEC continues to refuse to allow EU Exchanges access to US trading screens, even if those Exchanges are at least on par with the US in terms of quality and level of services, as well as in investor protection. This is a major issue for European Exchanges and impedes the free flow of capital across the Atlantic.

Finally, it must be noted that EU companies willing to be listed on the New York Stock Exchange have to release financial statements based on US accounting standards (US GAAP). This represents a significant cost for EU companies, as following the regulation adopted by the Council on 7 June 2002, all listed EU companies are required to prepare consolidated accounts under international accounting standards (IAS) by 2005. Therefore, the Commission is encouraging the SEC to take a positive role in the creation of international accounting standards (IAS). It will be important that IAS be acceptable for listings of US exchanges by the 2005 date for their adoption in the EU.

### **The Sarbanes-Oxley Act of 2002**

The Commission is currently studying the *Sarbanes-Oxley Act of 2002*. At first sight, as a result of the provisions relating to foreign accounting firms and foreign private issuers, some

EU companies could face conflicting laws on audits and corporate governance. The Commission will pursue its dialogue with the SEC in order to remove or minimise the impact of these possible consequences.

## 8.4 Transport Services

### *Air Transport*

Access by EU carriers to the US market of air transport services is restricted by a number of different measures, from restrictions on foreign investment to measures adopted in the aftermath of 11 September on security and state aid.

#### Restrictions on foreign investment

The *Federal Aviation Act of 1958* prohibits foreign investors from taking more than a 49% stake in a US carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules. Cross border investment is an important driving force behind liberalisation. Reducing foreign ownership restrictions would give better access for carriers to international capital, which in turn would contribute to growth, competitive effectiveness, and the promotion of competition and consumer benefits. In the past, the US Government has advocated the liberalisation of foreign investment restrictions, but thus far no progress has been achieved in this area.

#### Restrictions in aircraft repair and maintenance services

The *FAA reauthorisation bill (AIR-21) of April 2000* directs the Administrator to establish an aircraft repair and maintenance advisory panel. It also directs the Secretary of Transportation to request information from foreign air carriers in order to assess balance of trade issues. The EU remains concerned that a conflict could develop with the GATS-specific commitments undertaken by the US regarding aircraft repair and maintenance services.

#### Government procurement restrictions

*Section 1117 of the Federal Aviation Act* requires that, in general, transportation funded by the US Government (passengers and cargo; mail is covered by separate legislation) must be performed by US carriers. By contrast, in the EU any obligation for government officials to use "national flag" is considered to be anti-competitive and contrary to the Treaty.

#### Restrictions on leasing of foreign aircraft

US and EU rules on dry leasing are broadly similar in effect. However, Article 8(3) of Council Regulation (EEC) 2407/92 limits leases of foreign registered aircraft by EU carriers to a short term to meet their temporary needs, or otherwise if there are exceptional circumstances. Many EU carriers lease equipment (both with and without flight crew) from US carriers and leasing companies.

US rules on wet lease prevent any lease of non-US registered aircraft by US carriers. No Community-registered aircraft with Community flight crew can thus be leased to US companies. The US authorities subject applications for wet leases by EU carriers of third country aircraft for use on routes to the US to a "public interest" test.

#### Security in aviation

While fully supporting the need to ensure the highest levels of security in aviation, the EU has some serious concerns about the manner in which recent measures have been introduced. There is a worrying tendency towards the imposition of aviation security measures in an extraterritorial manner at airports on European soil. Many recent security rules have also been imposed without due warning and without proper consultation with EU authorities and the European industry as to their efficacy and practicality.

Of particular concern is the imposition of the *Advanced Passenger Information System (APIS)*. Originally an optional system designed to facilitate customs and immigration procedures, US authorities have now rendered the system obligatory, significantly increased the level of detail required about each passenger and imposed high rates of accuracy that will be enforced through heavy fines and the eventual denial of traffic rights. While the obligatory application of the scheme has been accepted given current circumstances, the strict rules on implementation and associated sanctions represent a real barrier to transatlantic operations by EU airlines. The levels of accuracy now required are, to all intents and purposes, impossible to meet given the technical limitations of the current system and the complex nature of air transport operations. The practicalities of ensuring accurate collection at the level of detail specified would severely affect the attractiveness of air travel to the US from the EU, and therefore have a severe impact on those European air carriers providing air transport services in that market.

On security screening services, the EU notes with concern that *Section 108 of the Aviation and Transportation Security Act* contains discriminatory clauses against foreign providers of security services. After an initial period of nationalisation, the Act allows for pilot programmes and the eventual re-entry of private firms into US airports, but it bars the entry of firms not owned and controlled by a citizen of the US. Given that European multinational corporations are among the world leaders in the provision of security services both at airports and generally, this discrimination represents a major step backwards in trade terms. It also represents a violation of the US specific commitments under the GATS, according to which the US is bound to impose no restrictions on the establishment of foreign security services.

#### State aid for airlines

While recognising the severe financial consequences of 11 September on US airlines and the need to ensure that vital transport services in the US were maintained, the EU is concerned about the scale of financial assistance provided by the US Government to US air carriers, particularly since financial problems of many airlines predated 11 September. This assistance could place US airlines at an unfair advantage compared to their European competitors who have received only tightly controlled compensation for the four-day closure of US airspace. In the US, \$5 billion was made available to airlines according to their size in the months after 11 September. A further \$10 billion has been made available in loan guarantees to ailing companies. The government has also supplied third party war risks insurance at virtually no cost to US airlines and their suppliers. The overall assistance given by the US Government to the US industry represents significant protection from the commercial pressures facing foreign air carriers and is a potential impediment to fair trade on transatlantic air routes.

#### ***Maritime Transport***

WTO negotiations on international maritime transport were suspended on 28 June 1996 with members agreeing to observe a standstill clause pending further negotiations. Resumption of these negotiations was an integral part of the new round on services launched in 2000 and, as such, those negotiations will be undertaken in the context of the DDA negotiations. The EU regretted that during the previous negotiations the US never tabled an offer relating to maritime transport services, and hopes that the US will endeavour to achieve a multilateral agreement in order to create a better environment for shippers and ship-operators. The EU believes that renewed maritime negotiations would provide an opportunity to cover all aspects of modern door-to-door shipping, including commitments on multimodal activities and that the most effective means to achieve the widest possible liberalisation is through the WTO.

While international maritime transport markets in the US are predominantly open, significant restrictions remain on the use of foreign built vessels in the US coastwise trade and in relation to access to certain international cargoes from which non-US vessels are excluded.

#### Restrictions on coastwise trade

Under the *Merchant Marine Act of 1920* (so called *Jones Act*), foreign-built (or rebuilt) vessels are prohibited from engaging in coastwise trade either directly between two points of the US or via a foreign port. Trade with US island territories and possessions are included in the definition of coastwise trade. Moreover, the definition of vessels has been interpreted by the US Government to cover hovercraft and inflatable rafts. Limitations on rebuilding act as another discrimination against foreign materials: the rebuilding of a vessel of over 500 gross tonnes (gt) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 gt) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (46 USC 83, amendments of 1956 and 1960). In the context of the negotiations for the OECD Shipbuilding Agreement, it was agreed that the Jones Act would be subject to a special review and monitoring procedures.

In addition, no foreign-built vessel can be documented and registered for dredging, towing or salvaging in the US. Third countries are therefore unable to have access to the US market at a time when part of the US fleet needs renewing and many US ports are in need of dredging.

#### Restrictions related to public procurement

The US has a number of statutes in place that require certain types of government-owned or financed cargoes to be carried on US-flag commercial vessels. The impact of these measures is significant; they deny EU competitors access to a very sizeable pool of US cargo, while providing US ship owners with guaranteed cargoes at protected, highly remunerative rates.

The application of these measures to US public procurement contracts introduces uncertainty for those businesses whose tenders include shipping goods to the US. Whether they are required to ship the goods on US-flagged vessels, which charge significantly higher freight rates than other vessels, is not known until after the award of the contract.

The relevant legislative provisions are:

- The *Cargo Preference Act of 1904* requires that all items procured for or owned by the military departments be carried exclusively on US-flag vessels.
- *Public Resolution N°17*, enacted in 1934, requires that 100% of any cargoes generated by US Government loans (i.e. commodities financed by Export-Import Bank loans) be shipped on US-flag vessels, although MARAD may grant waivers permitting up to 50% of the cargo to be shipped on vessels of the trading partner.
- The *Cargo Preference Act of 1954* requires that at least 50% of all US government-generated cargoes covered be carried on privately owned US flag commercial vessels if they are available at fair and reasonable rates.
- The *Food Security Act of 1985* increases to 75% the minimum proportion of agricultural cargoes under food aid programs to be shipped on US-flag vessels. The additional cost is subsidised by the USDA and the US Maritime Administration and charged out of US food aid funds.
- The *Alaska Power Administration Sale Act of 1995*, while removing the prohibition on the export of Alaska crude oil, retained the pre-existing US flag vessel carriage requirement of such exports.

#### Maritime security

The *US Maritime Transportation Antiterrorism Act of 2002 (HR 3983)*, as adopted in the House of Representatives, foresees the setting up of a system of "foreign ports assessment", which is based on undefined US benchmarks. It also contains provisions which could lead to controls on board ships outside territorial waters and to proscribing ships arriving from foreign ports deemed "not secure" by the US to enter US ports, currently without any reference to international work on the issue. The legislation raises concerns over possible

serious distortions of competition between ports (faster clearing of containers arriving from "secure ports").

In addition, the *Container Security Initiative* launched by the US, will probably, through its implementation in different steps, induce discriminatory effects on EU ports, and possibly lead to disruption of traffic and transport patterns, threatening the functioning of the single market (see Section 5.1. of the report on "Registration, Documentation, Customs Procedures").

Finally, particular emphasis should be provided to the proposed customs rule *Presentation of Vessel Cargo Declaration to Customs before Cargo is laden abroad Vessel at Foreign Port of Transport in the United States* (8 August 2002). This proposed customs rule requires that US Customs receive a vessel's cargo manifest (cargo declaration) from the carrier 24 hours before the cargo is laden abroad the vessel at a foreign port for transport to the US. Although the Commission acknowledges the desire to have information as early as possible on consignments destined for the US to assist US Customs in evaluating the risk presented by those goods, these measures should not result in distortion of competition or create major problems for international trade. The Commission firmly believes that placing the onus for the provision of this information on carriers before the goods are loaded on board, and thus before the full cargo information is available, amounts to a fundamental restructuring of current trade practices, which would create significant trade barriers on a short and medium-term perspective.

Among others, the following factors are in support of the previous argumentation:

- the measure will have a negative impact on logistic processes worldwide;
- US bound consignments will need to be in the transport chain for some days in excess of current norms;
- cargo-related documentation requirements will be fraught with difficulties for carriers, exporters, US importers and consignees, forwarding agents at both loading and discharge ports and finally significant incompatibility with offering a service consistent with the "just in time" regime on which both exporters and importers depend today.

Therefore, US authorities should consider a more pragmatic information procedure with the same degree of security compatible with implementation requirements in terms of logistics and cost considerations to be implemented on a global level.

## 9 US COMPLIANCE WITH WTO DISPUTE SETTLEMENT RECOMMENDATIONS

*Article 21.1 of the WTO Understanding on Dispute Settlement (DSU)* states that prompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of WTO Members. Moreover, *Article 3 of the DSU* affirms that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".

Notwithstanding these provisions, the US has a poor record with regard to compliance with recommendations and rulings formulated by the DSB on the basis of Panels' and the Appellate Body's reports. Some statistics might be useful to understand the dimension of the problem. The US has lost 17 out of 19 cases as respondent. For three cases, the reasonable period for implementation has not yet expired. Out of the remaining 14 cases, on 6 occasions the US either did not implement or had to go through an Article 21.5 compliance panel before implementing the DSB recommendations.

In the *1916 Anti-dumping Act* case (see Section 5.8 above), the Panel and Appellate reports condemning the US legislation were adopted on 26 September 2000 and the reasonable period of time expired on 26 July 2001. This period for implementation was extended until the end of 2001, with the agreement of the EC. While legislation to repeal the Act was introduced in the House on 20 December 2001, no concrete action has been yet taken by the US to comply with the DSB recommendations. Finally, on 7 January 2002, the EC had to request the authorization to suspend concessions in order to safeguard its rights. The US requested arbitration on the level of suspension proposed. At present, these proceedings have been suspended, but either party may reactivate them at any time. At the time of writing, the US has not yet repealed the 1916 Anti-dumping Act.

Similarly, *Section 110(5) of the US Copyright Act* (see Section 7.1 above) was recognised as WTO inconsistent by the Panel's report adopted by the DSB on 27 July 2000. The reasonable period of time for implementation expired on 27 July 2001, and was then extended until the end of 2001, with the agreement of the EC. Also in this case, no action has been taken by the US in order to comply with the DSB recommendation.

Of course, the most blatant example of non-compliance by the US is the *Foreign Sales Corporation* case (See Section 5.10 above). The Panel's and Appellate Body's report condemning the US tax system were adopted on 20 March 2000. Two years later, and after being condemned again by a compliance panel and the Appellate Body on 14 January 2002, the US has not yet implemented the DSB recommendations. The arbitration report on the value of the countermeasures the EC is entitled to in this case, was issued on 30 August 2002. WTO arbitrators authorised the EC to impose sanctions at the level of US\$4,043 million by increasing the customs duties on certain selected products up to 100%.

The deficiency in implementing adverse DSB recommendations is not a recent feature of US practice. In the *DRAMs* case, the DSB on 19 March 1999 recommended the US to bring its measure in compliance. On 17 January 2000, the United States submitted a status report to the DSB, stating that it had sought to implement the DSB recommendation. The "implementation" resulted in the US DoC's determination not to revoke the anti-dumping duty order on DRAMs from Korea. Quite obviously, Korea requested a compliance panel under Article 21.5 of the DSU, which was then suspended as the US agreed to eventually drop the measure.

The DoC did not limit its peculiar performances to the DRAMs case. In the *British Steel* case, the DoC methodology on countervailing duties on privatised exporters was considered as WTO incompatible. The US repealed the measure at issue in the specific case, and then elaborated a "new" methodology even more WTO incompatible and prejudicial to EU exporters, misinterpreting the Appellate Body report. Due to this minimalist implementation of the DSB recommendation by the US, the EC, in order to defend its legitimate interest, could only request the establishment of another Panel, on the same issue, covering all 14 privatisation cases affected by the US methodology, with a considerable waste of resources for the parties and the WTO Secretariat. The Panel report was circulated on 31 July 2002, and it upholds the claims of the EC.

## LIST OF FREQUENTLY USED ABBREVIATIONS

ANSI	American National Standards Institute
APHIS	Animal Plant and Health Inspection System
ASCM	WTO Agreement on Subsidies and Countervailing Measures
ASME	American Society of Mechanical Engineers
ATF	Bureau of Tobacco, Alcohol and Firearms
CENELEC	European Electrotechnical Standards Committee
CNT	Conditional National Treatment
DDA	Doha Development Agenda
DoC	Department of Commerce
DoD	Department of Defense
DoT	Department of Transport
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
EC	European Community
EPA	Environmental Protection Agency
EU	European Union
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDI	Foreign Direct Investment
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GPA	WTO Government Procurement Agreement
GSM	General Sales Manager
IEC	International Electrotechnical Commission
IPR	Intellectual Property Rights
ISO	International Standardisation Organisation
ITC	International Trade Commission
ITU	International Telecommunications Union
MARAD	Maritime Administration
MFN	Most-favoured Nation
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organisation
NOAA	National Oceanics and Atmospheric Administration
NTA	New Transatlantic Agenda
OECD	Organisation for Economic Co-operation and Development
OIE	World Organisation for Animal Health
OSHA	Occupational Safety and Health Administration
R&D	Research and Development
SEC	Securities and Exchange Commission
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TABD	Transatlantic Business Dialogue
TBT	Technical Barriers to Trade Agreement
TEP	Transatlantic Economic Partnership
TRIPs	WTO Agreement on Trade Related Aspects of Intellectual Property Rights
TRQ	Tariff Rate Quota
USDA	US Department of Agriculture
USTR	US Trade Representative
WCO	World Customs Organisation



WIPO      World Intellectual Property Organisation  
WTO      World Trade Organisation